Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN P. SHELTON; ACI INVESTORS PROTECTIVE ASSOCIATION, AND 155 OTHER DEFRAUDED REAL ESTATE INVESTORS IN AMERICAN CAPITAL INVESTMENTS, INC.,
Petitioners,

v.

WILLIE BARNES, as successor to RICHARD G. SHAFFER, receiver for AMERICAN CAPITAL INVESTMENTS, INC.; and the SECURITIES AND EXCHANGE COMMISSION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a general federal law of equity receivership exists under which a federal court receiver may disregard the state law property rights of persons who are not parties to the receivership action and sell their separate interests in property owned jointly with the receivership defendant over their objections, in derogation of their state law rights, and in a manner contrary to state receivership law.

(2) Whether an order confirming a receiver's sale of real property is "final" for purposes of appeal, or, as the Court below held, raises issues of appellate jurisdiction so doubtful and complex as to warrant invocation of the "assumed appellate jurisdiction" doctrine of *Norton v. Mathews*, 427 U.S. 524 (1976).

PARTIES TO THE CASE

The Respondents to this Petition are Mr. Willie Barnes, as successor to Mr. Richard G. Shaffer, deceased, not individually but as Receiver for American Capital Investments, Inc.; and the Securities and Exchange Commission, at whose suit the Receiver was appointed. The Petitioners are Mr. John P. Shelton, the ACI Investors Protective Association, an unincorporated association under California law, and its 156 members. Mr. Shelton and the 155 other investors (husbands and wives counting as one individual) are not named parties or defendants to the SEC's Receivership action, but are parties in interest because of their investment in securities promoted by the Receivership Defendant, American Capital Investments, Inc., a California corporation, and their ownership of property in the possession of the Receiver.

Petitioners' names are:

Alpers, Robert
Anderson, Robert
Armstrong, John
Aucoin, Gerard
Bailey, Henry
Bailey, Howland & Ann
Bailey, Joseph
Barker, Lee & Florence
Barker, Milton
Bauchiero, Wallace, Jr.
Benton, Francis
Bilile, Ray G.
Boley, Jerry & Willene
Borghi, Richard
Bradford, Elizabeth
Bryant, Lloyd
Bullington, Eugene
Burkhard, Wil
Burtschi, Henry
Cable, Walt & Marilyn
Campbell, Robert
Carroll, Doug
Castro, Jerry
Christman, Robert & Marie
Clemens, Jess & Catherine
Cockrum, James & Maria
Coie, James & Patricia
Colbert, Richard H.
Colley, Mildred
Corn, Erna
Crawford, Robert
Critton, Beatrix & Lee
De Ciutiis, Alfred
Dickson, Dan
Eisenberg, Todd & Sharia
Ellenbogen, Richard & Steph
Fernyhough, Lila
Fitzgerald, Lawrence, J.
Fletcher, A. Martyn

Galka, Ray
Gammage, Kennedy & Joan
Geller, Mike
Gillette, Jeanne
Goodwin, William
Groeper, Larry
Hale, Tom
Harrison, Herb
Harrow, Larry
Hartanov, Andrew
Harthorn, Randy
Hart, Roger
Harvey, John
Hing, Bill
Hirsch, Uri
Hordis, Victor
Horn, Dennis & Jayne
Horton, William & Jo
Humiston, Matthew
Humphrey, Gordon
Hennings, Don
Johnson, Eddie & Ann
Kauffman, Ray
Keifer, Mel & Judith
Kennedy, Brian
Klasewitz, Zev J.
Kobylt, Monic J.
Kolesar, Michael L.
Kregzde, John
Kresbach, Mike
Kwan, Reddy
La Plante, Bruce
La Pointe, Jackie
La Pointe, Richard
Lee, Gary & Beverly
Leonard, Mary
Levin, Neal
Lev, Ira
Lindhal, Robert & Shirley
Linscott, Jon & Julia
Linton, Lucky
Madsen, Nellie
McAdam, Robert
McBride, Donald
McDonald, Barry
Metten, Carl F.
Meucci Engineering, Inc.
Meccu-Harmar Associates
Meucci, Raymond M.
Miller, Linda & John
Minney, Jack L.
Moller, James
Moore, James & Jean
Morrison, James & Jean
Morrison, R. Al
Murdock, Stan
Myerson, Gary
Myers, Andrew & Vicki
Nason, Fred Jr.
Nason, Richard
Newman, Bill
Oettinger, Elizabeth
Onaga, George
Ordonez, Amparo
Orosz, Jordan
Owen, Robert
Palluth, William
Patterson, Nancy
Pekny, Frank P.
Petryni, Thaddeus
Pfeifer, Bert
Phalen, William
Phillips, David
Pirtle, Lynne
Porter, Russ
Powell, Odette

Ramer, Alan
Rogazione, Mike & Sharon
Rogers, Bob & Sandra
Rogers, Mike
Rohr, John & Elaine
Rosenberg, Reinhardt
Ross, David
Schultz, Ed
Schumacher, Art
Shadek, James
Shaw, William D.
Shelton, John & Ivy
Shue, Donat
Smay, Betty F.
Smith, Marion
Smoll, Allen & Helen
Stafford, Gilbert
Summers, Edward
Sweeney, Allen & Donna
Tanner, Marc
Taylor, Virgil & Janet
Telaneus, Dick
Thaemert, Victor & Pat
Tobey, G. Al
Upton, Donald
Vandenbroek, Abe
Cannote, Richard
Vincent, Earl
Vinson, Willis D., Jr.
Vollmer, Charles A.
Wade, Gary
Wallstrom, Doris
Warnas, Joseph J.
Warner, Barry & Sondra
Weigand, Eugene
Weise, Robert & Jean
Wilson, Jeff
Winnett, Harold
Yates, Bruce
Yoshida, Edward
Ziegler, Phil & Roseanne

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JOHN P. SHELTON; ACI INVESTORS PROTECTIVE ASSOCIATION, AND 155 OTHER DEFRAUDED REAL ESTATE INVESTORS IN AMERICAN CAPITAL INVESTMENTS, INC.,

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v.

WILLIE BARNES, as successor to RICHARD G. SHAFFER, receiver for AMERICAN CAPITAL INVESTMENTS, INC.; and the SECURITIES AND EXCHANGE COMMISSION,

Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioners the ACI Investors Protective Association, an unincorporated association under California law, and its members, John P. Shelton and 155 other investors in real estate investments promoted by defendant in receivership American Capital Investments, Inc., a California corporation, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 98 F.3d 1133 (9th Cir. 1996) and is reprinted as Appendix A hereto at 1a-28a. There were four separate consolidated appeals before the Ninth Circuit: (1) the appeal of the District Court Order confirming the sale at issue; (2) the appeal of the Order denying Petitioners' Rule 60 motion to set aside confirma-

tion of the sale; (3) the appeal of the Order imposing an injunction against collateral attacks on the sale confirmation Order; and (4) the appeal of the Order approving certain modifications of the confirmed sale. These four Orders of the United States District Court for the Central District of Columbia are reprinted as Appendix C at 39a-45a (Sale Confirmation Order); 29a-38a (Order on F. Rule Civ. Pro. 60(b) Motion); 46a-47a (Injunction against Collateral Attack) and 48a-49a (Modification of Sale Terms).

JURISDICTION

The Court of Appeals' Opinion was filed October 22, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 959 provides:

> Trustees and receivers suable; management; State laws
>
> (a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.
>
> (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager, according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

STATEMENT

The court below declared by fiat that there is a federal common law of receiverships which permits *any* federal

court receiver to disregard state created property rights and state limits on the powers of a receiver, without a showing of a compelling federal interest and in contravention of a federal statute mandating the use of state law. The court below disavowed the established rule that

> the guiding principle [in deciding to create a federal rule of decision] is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.

Atherton v. Federal Deposit Insurance Corporation, —— U.S. ——, 1997 WL 9791 (January 14, 1997) (citations omitted), finding that the mere exercise of federal equitable power in bringing property into the possession of the court through appointment of a receiver conferred power to create a federal rule of decision in derogation of the admitted limitations on the defendants' title and the rights of others under state law. (Pet. App. 18a-24a).

At issue was a receiver's sale of real estate, allegedly for the benefit of the Petitioners, who were defrauded by the receivership defendant in connection with their purchase from the defendant of partnership and other interests in several parcels of real estate. The Petitioners are substantially all of the defrauded investors and they hold interests in the real estate as partners (both limited and general) in some real estate and pursuant to deeds for fractional undivided interests in other real estate. Because the shareholders of the defendant corporation were compelled to "disgorge" their interests in the real estate as part of the remedy obtained by the plaintiff Securities and Exchange Commission ("SEC") in its final judgments against the defendants, the Petitioners are the only parties holding an interest in the real estate.

After the SEC obtained appointment of a permanent receiver and, later, "final judgments" and injunctions against the defendants, the sole issue remaining in the case was the disposition of the real estate interests accumlated by the receivership defendants. The Petitioners, who formed a "Securities Owners Protective Association" under California Law (Corporations Code at §25000 et

seq.), determined that their interests were best served by "spinning off" the real estate in kind to themselves and terminating the receivership. The receiver appointed at the SEC's instance, for reasons of his own which were never made clear to the Petitioners, determined to sell the real estate to a third party over the unanimous objections of the sole parties entitled to ownership of the real estate.

The Petitioners argued that California State law governed the case and that for the reasons this Court elucidated in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed. 67 (1994), the receiver merely "stepped into the shoes" of the defendants. Therefore, the receiver could not convey a title superior to that owned by the receivership defendant. The receiver argued (and the Ninth Circuit agreed) that the mere exercise of the court's equitable power to appoint a receiver and the receiver's possession of the real property without more conferred "full power" (Receiver's Answering Brief below at 38) over the property—including a power of sale without regard to the title of co-owners.

California State law is squarely to the contrary, as is the law of other States as declared by this Court: "a receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State." *Marshall v. New York*, 254 U.S. 380, 385, 41 S.Ct. 143, 145 (1920) (Applying New York Law). Compare, *Allen v. Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960) "any defense good against the original party is good against the receiver," and the other California authorities discussed below.

The decision below revivifies the debate, which this Court has twice recently attempted to end (*O'Melveny* and *Atherton*), over the ability of the federal courts to fashion their own "federal common law" in receivership cases. Indeed, the rule stated by the court below is far more sweeping than the rule stated by the same circuit overturned in *O'Melveny*. The prior overturned decision

was at least a case where a government agency was the receiver, acting under a statutory scheme specifically contemplating that a government agency would be receiver and where the government held a pecuniary interest of its own. The instant case states an expanded general authority applicable to all federal receiverships without regard to the identity of the receiver or the interest of the federal government. The decision throws into confusion real property investors and syndicators, if not all commercial relations generally, with its sweeping pronouncement that a federal court sitting in receivership can disregard rights and obligations of the parties created under state law—as it comports with the court's own view of federal "equity."

The case commenced August, 1993 when Plaintiff SEC obtained an injunction against Defendant American Capital Investments, Inc., a California corporation ("ACI") and certain of its related individual shareholders, principals and officers (collectively, "Defendants"), for violating federal securities law through sales of interests in a number of real estate investments. The Petitioners (hereinafter at times the "Investors") are substantially all of the victims of ACI's fraud who purchased interests in some or all of the ACI real estate ventures. The Investors hold approximately 95% of the monetary claims against the ACI estate.

In late 1993, the district court issued an injunction shutting down ACI and appointed Mr. Richard G. Shaffer as ACI's receiver [1] (the "Receiver"). The Receiver took possession of ACI's assets, materially consisting of direct individual interests under deeds in real estate or indirect interests as "managing general partner" in supposed limited partnerships which in turn owned real estate. The district court entered "Final Judgments and Orders" against the Defendants forcing them to disgorge their interests in ACI, and continued the receivership for the

[1] Mr. Shaffer has since died and has been replaced as receiver by Mr. Willie Barnes.

purpose of liquidating the ACI estate. Although the illegal investment scheme had been shut down, the Defendants had given up their interests, and all that remained was the determination of estate claimants' rights and disposition of assets to satisfy their claims, the SEC steadfastly refused to allow liquidation of the real properties through a bankruptcy or to even consider any proposal other than a sale of the real properties to a "secret buyer" over the Investors' unanimous opposition.

There was no question as to the state of title to the real estate under State law. In ACI's investment scheme, Investors were at times "limited partners" in partnerships which held title to real properties. However, ACI never validly formed two of these limited partnerships, and therefore, under California law, the limited partnerships were really general partnerships. Investors were also holders of undivided direct interests in real properties by conveyances under unrecorded deeds ACI had delivered to them. In either case, ACI shared title to the properties as a tenant in common with either a partnership or one or more individual Investor deed holders.[2]

The Investors opposed the sale on the basis that the Receiver had no authority to sell 100% of the interests in the properties. The objection was simple: the Receiver could only sell ACI's interests in the real properties; he could not sell the interests of Investors holding deeds or the property interests owned by the partnerships in which the Investors were partners. The Investors argued that the Receiver, as successor to ACI, did not have the power, under state law, to sell real property in violation of ACI's partners' rights. Citing 28 U.S.C. § 959(b), the Investors noted that Congress had made it clear that the federal

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[2] Although the Investors argued that the Receiver had no right to sell the real property interests they held under the deeds, neither the district court nor the Ninth Circuit explicitly addressed the source of the Receiver's power to sell such interests. Presumably, the same "federal common law" which permitted the Receiver to sell the partnerships' real property in violation of California law also allowed him to sell the interests held by Investors under deeds.

courts were bound to observe state law in a federal receivership proceeding. Nevertheless, over the unanimous objections of the Investors, ACI's co-owners under deeds and its partners, and in complete derogation of their state law rights, the Receiver eventually purported to sell 100% of the interests in the real properties to corporations owned by the Canadian financier family, the Belzbergs.

The district court ignored the Investors' argument that it and the Receiver had no right under state law to sell the Investors' and the partnership's real property interests. In the order confirming the sale, the district court found that "ACI owns eight parcels of property . . . [and] holds title to three parcels with California limited partnerships, of which ACI is the general partner." Pet. App. 40a. Relying upon *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 210 (1992), the district court rested its ability to order the sale on (1) the partnerships' properties having been included in the receivership order and taken into the possession of the court appointed receiver, (2) the court having personal jurisdiction over the partnerships and their property, and (3) the Investors having received notice of the sale and "an opportunity to be heard." Pet. App. at 41a-43a. Without any analysis of relevant state law, the district court also summarily found that ACI, "as general partner of the limited partnerships," could sell partnership assets. Thus, the court could order "the sale of the properties not owned solely by ACI." *Id.*

Following the court's entry of the sale order, the Investors moved under Rule 60 to set aside the sale order because, among other reasons, it was void for lack of subject matter jurisdiction and based on mistakes of fact and law. The Investors reiterated their argument that the district court could not sell their real property interests over their objections, and explained that *San Vicente*, which held that a partnership of an investment conglomerate, which was drawn into receivership proceedings by the placement of its general partner's parent company in

receivership could be forced to pay its share of receivership administrative expenses, did not and could not support the sweeping proposition that a federal court could authorize and order a sale of real property interests in violation of the interest owners' state law rights. The Investors pointed out that the district court had been mistaken in finding that ACI, as "general partner" had authority to sell the partnerships' real properties, because the partnerships, both under their partnership agreements and as a matter of California law, had been dissolved upon the Receiver's appointment. Once dissolved, the general partner had no authority to sell partnership property. Further, as noted, two of the limited partnerships had not been properly created, and thus, under California law, were general partnerships.

In its order denying the Investors' Rule 60 motion to set aside the sale order, the district court again relied on *San Vicente*, and again confused personal jurisdiction, subject matter jurisdiction, possession versus title, and partnership property as opposed to property held directly by ACI. The court repeated that the partnerships' real property was in the possession of the Receiver under the receivership order, that the court had personal jurisdiction over the Investors based on their "minimum contacts," and that the Investors had been given notice and an opportunity for a hearing. Pet. App. at 33a. Citing *San Vicente*, the court found that it could ignore California law entirely, and that it did not matter that the partnerships had been dissolved under California law and the express terms of the partnership agreements, because, based on *San Vicente*, the Receiver was the Receiver for the partnerships' property, and not the general partner of the partnership. Pet. App. at 34a-35a, n.4. Thus, merely because the Receiver had possession of the partnerships' properties under the receivership order, state law was irrelevant, and the district court could authorize the sale of 100% of the real property interests. In essence, the district court held that it had "special powers" under the "law of federal

equity receiverships", which permitted it to sell the Investors' real property interests over their objections and in violation of their state law rights.

The district court entered two further orders effectuating the sale. First, the district court enjoined collateral attacks on the sale and ordered that the Investors' claims to their property be deemed "transferred" to the sale proceeds. (Pet. App. D) Second, the court approved amendments to the sales contract, all designed to enable the purchaser to obtain title insurance notwithstanding the Investors' inevitable appeal. (Pet. App. E) Petitioners timely appealed from the four orders entered by the district court which collectively provided for the sale of ACI's real estate interests—as well as the separate property interests of the Investors in the same real estate: the Sale Order, entered December 7, 1994 (Pet. App. C at 39a-45a), which confirmed the sale, and the Rule 60 Denial Order, entered on January 31, 1995 (Pet. App. B at 29a-38a), which denied the Investors' Rule 60 Motion, and the "transfer" and "amendatory" orders.

The Ninth Circuit initially dismissed the Sale Order and Rule 60 Denial Order Appeals as premature interlocutory appeals of "sale" orders that were not appealable. However, in response to the Investors' Petition for Rehearing, which cited the Court's long-standing opinions that a receivership sale order is a final appealable order, the Ninth Circuit withdrew its April 27, 1995 dismissal order and reinstated the two appeals. Unfortunately, although the Investors had also asked for an emergency stay of the sale and expedited review of their Rehearing Petition, the Ninth Circuit's about face to correct its error was slow to occur and not announced until August, 1995.

Meanwhile, in June, 1995, based on the amended Sale Order, the Receiver purported to "close" the sale and convey interests in the properties held by ACI and the Investors to the Belzberg-controlled corporations. The Investors interests' held under unrecorded deeds of which both the Receiver and the Belzbergs had notice were

ignored in the conveyance documents. With respect to the interests held by the partnerships, the Receiver signed the deeds as authorized signatory for ACI, acting as "general partner" of the non-existent "limited" partnerships. Thus, the Receiver purported to convey real property in the name of California limited partnerships that did not exist as a matter of California law; and the district court held he could do so because "federal common law" provided the Receiver with such power. Pet. App. 33a-35a; 41a-42a.

Since it had been conceded that the sale could not have proceeded under California State law, the Investors contended that the only way to uphold the sale would be for the Ninth Circuit to concur with the district court that there was indeed a "federal common law" that could be used to trump the Petitioners' state law rights. Thus, not surprisingly, the Ninth Circuit identified the "key issue" as "whether the district court exceeded its jurisdiction" in confirming the Receiver's sale purporting to convey title to real property "in which appellants claim legal interests", and stated the question as "[D]oes California partnership law or the federal law of equity receivership control the Receiver's power to convey title?" Pet. App. 17a.

Noting that the district court "twice addressed its jurisdiction to conduct a sale of partnership assets, first in the Sale Order and second in the Rule 60 Order," the court chose to "address only [the district court's] second more considered ruling," in which "the district court abandoned its prior reliance on ACI's status as general partner of the limited partnerships as a basis for its power to confirm the sale." *Id.* at 19a. Thus, the Ninth Circuit made it clear that the district court's power to order the sale had to exist, if at all, based on "federal common law."

Indeed, the Ninth Circuit found that there was such a federal common law, stating that "Appellants' assertion that 'there is no federal common law of receiverships' is vastly overstated." The court distinguished *O'Melveny,*

finding that it was limited to its facts and irrelevant. *Id.* at 23a. The court then held that federal common law of equity receiverships, and not state law, governed the rights of the owners of the real estate interests. *Id.* In so holding, the Ninth Circuit, like the district court, relied almost exclusively on "the federal common law rules regarding the powers of equity receiverships" and *San Vicente*. *Id.* In so holding, the Ninth Circuit also found that 28 U.S.C. § 959(b), the federal statute which embodies Congress' considered judgment that state law apply to determine substantive rights in federal receiverships, was of no import. Pet. App. 20a.

The Ninth Circuit simply announced, without authority, that there was indeed a federal common law that permitted the district court to order the sale of property not owned by the corporation in receivership. The court did not apply or even mention this Court's clearly enunciated four part test for determining whether or not a federal common law should be found as set forth in *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Moreover, it ignored the requirement, first stated in *Kimbell Foods* but later more fully explained in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 LEd.2d 152 (1991), that before applying a federal common law rule of decision, a federal court must consider how a uniform federal rule will affect commercial and contractual relationships that are based on state law. Indeed, the Ninth Circuit's new "federal common law of receiverships" renders rights conferred by contracts made under state law useless in a federal receivership proceeding.

Aside from its announcement of new federal receivership common law, the Ninth Circuit also questioned whether it had jurisdiction to consider the appeals, a question upon which it had already reversed itself when it initially incorrectly dismissed the Investors' appeals. Finding "tension" between two unquestioned century old decisions of this Court that hold a receivership sale order

is appealable and one of its own decisions, the Ninth Circuit failed to follow this Court's binding precedent and did not assert jurisdiction. Instead, it asserted "hypothetical jurisdiction."

The Ninth Circuit heard oral argument on the four appeals on August 6, 1995 and entered its opinion on October 22, 1996.

REASONS FOR GRANTING THE WRIT

The central issue in this case is whether there is a judge-made "federal common law" which grants a receiver, who controls and possesses real property in the receivership in which other estate creditors have interests as co-owners under state law, the right to sell the real property, including the co-owners' interests, over their objections and in violation of their rights under state law. The Ninth Circuit found that there is such a "federal common law," and that it grants a receiver such power, calling its holding ". . . a conclusion firmly rooted in the common law of equity receiverships." Pet. App. 20a.

The Ninth Circuit's ruling in the case below is far-reaching and extraordinary, and merits review by this Court for four reasons. First, the decision defies decades of binding authority of this Court regarding the applicability of federal common law rules of decision to actions involving state created rights, culminating in the recent *O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) and *Atherton v. Federal Deposit Insurance Corp.*, —— U.S. ——, —— S. Ct. ——, —— L.Ed.2d ——, (Westlaw citation 1997 WL 9781 (U.S.)) (January 14, 1997). Second, the decision below resurrects the very same conflict among the Circuits, which this Court resolved in *O'Melveny* (and reiterated in *Atherton*) where this Court held that federal common law should not be applied except in the rarest of instances, and only after applying the tests set forth in *Kimbell Foods* and *O'Melveny*. Third, the ruling below ignored both the Constitutional limita-

tions on the powers of the federal courts and the specific federal statute, 28 U.S.C. § 959(b), which instructs that federal receivers must follow State law in their management and operation of receivership properties. Fourth, the ruling below refused to follow binding authority of this Court regarding the appealability of a receivership court's sale order and questioned whether or not a receivership sale conducted under a void order can be challenged after "closing" of the sale, fundamentally expanding and misapplying the "assumed appellate jurisdiction" doctrine and creating a further conflict with other circuits, which apply the doctrine only where there is a complex and unsettled question of appellate jurisdiction. Here, *if* there was jurisdiction to confirm the sale, the closing of the sale moots the appeals. But where there is no jurisdiction, there can be no lawful sale, and as this Court has held, a court can determine on appeal that the sale was void and therefore conveyed no title. *See Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 9 L.Ed. 490 (1836).

First and foremost, the Ninth Circuit was fundamentally wrong in failing to apply to this case the clear standards for the creation and application of federal common law consistently enunciated by this Court throughout this century. This case fits squarely within the line of cases beginning with *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), continuing up through *United States v. Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), and culminating in *O'Melveny* [3] and *Atherton*.

Second, the Ninth Circuit has resurrected the uncertainty that existed prior to *O'Melveny* concerning how and when federal courts may create and apply federal common law to displace substantive State law in federal receiver-

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[3] *See also, Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711 (1991), *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 784, 68 L.Ed.2d 114 (1981).

ship actions. Not only did the Ninth Circuit's decision below eviscerate *O'Melveny*, it is also squarely in conflict with the numerous decisions of all other United States Circuit Courts of Appeal which have followed *O'Melveny* and its predecessors in considering the applicability of federal common law to displace state rules of decision in actions involving state created rights. Because the Ninth Circuit has limited O'Melveny to its own facts, there once again exists a conflict among the Circuits over how and when federal common law may be applied. Moreover, the United States District Courts in the Ninth Circuit will now face substantial uncertainty in dealing with these questions. To the extent these courts follow the Ninth Circuit's ruling and adopt federal common law rules of decision which extinguish the state-law property rights of innocent co-owners of property in the possession or control of a federal receiver, as the District Court did in this case, they will be doing so in contravention of decades of Supreme Court authority. Such an incongruity in our judicial system cannot be tolerated.

Third, the Ninth Circuit exceeded the constitutional limitations on the lawmaking power of the federal courts when it applied a judge-made, federal common law rule of decision, in complete disregard of this Court's precedents. The Ninth Circuit used its new Federal common law rule of decision to displace: (1) the explicit California law that created the property rights at issue and the cause of action under which Petitioners had brought their claims, and (2) the federal statute which directs that federal receivers must follow State law in their management and operation of any and all receivership properties in their possession. *See* 28 U.S.C. § 959(b).

Finally, the Ninth Circuit ignored binding authority of this Court regarding whether or not a sale order is appealable and whether or not a receivership sale conducted under a void order can be challenged after "closing" of the "sale."

The effect of the Ninth Circuit's ruling on commerce and our federal system is profound, as it disregards the three sources of controlling law in this case. As stated above, the ruling below ignored this Court's binding precedents. Moreover, the Ninth Circuit contravenes the express intent of the only two sovereigns having jurisdiction over the matters at issue: the State of California and the United States Congress. Regarding the property rights at issue below, both the State of California and Congress, as law-makers, require a State rule of decision to govern in a receivership involving state law property rights.[4] Thus, until the Ninth Circuit's decision, either the laws of the sovereign States or the statutes enacted by Congress provided the rule of decision in actions involving state law property claims against a receiver. The Ninth Circuit has now judicially created a third sovereign: the federal courts, as long as they are applying "the federal common law of equity receiverships" (as determined by the federal courts). The result is that *in the Ninth Circuit* no one—no creditor, debtor or anyone else entering into a contract or acquiring property under state law—can be certain that his or her contract or property rights will be honored in a federal court receivership. Because there is always a possibility that one with whom a person has contracted may go into federal receivership, any state law property rights for which these individuals bargained may be completely disregarded *in the Ninth Circuit*, by a federal receiver applying a judge-made "federal law of equity receiverships."

A decision vesting such broad, sovereign lawmaking authority in the federal courts is not authorized by the Constitution, any federal statute, any State law, or any decision of this Court. It must be reversed.

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[4] *See* California cases cited in Section III. A., below; 28 U.S.C. § 959(b).

I. THE OPINION BELOW EVISCERATES BOTH *O'MELVENY & MYERS v. FDIC* AND *ATHERTON v. FDIC*, RESURRECTING THE OVERUSE OF FEDERAL COMMON LAW OF RECEIVERSHIPS THIS COURT SO RECENTLY AND AUTHORITATIVELY REJECTED

It is impossible to defend the Ninth Circuit's ruling in this case, given the clear and consistent rules repeatedly announced by this Court regarding the permissibility of creating and applying federal common law. If the Ninth Circuit's ruling in this case is correct, then either this Court wrongly decided *O'Melveny* (and now *Atherton*) or, as the Ninth Circuit held below and has stated elsewhere, *O'Melveny* must be confined to its own facts.[5]

Here, the Ninth Circuit completely misread and misapplied *O'Melveny* and its progenitors. After limiting *O'Melveny* to its own facts, the Ninth Circuit displayed the ". . . runaway tendencies of federal common law . . ." decried by this Court. *O'Melveny*, 512 U.S. 79, 114 S.Ct. at 2055. Faced with California law that clearly prevents a Receiver from disposing of the real properties in his possession over the objections of innocent co-owners, the Ninth Circuit applied a "federal common law" rule of decision to uphold the sale. It did so without identifying any "significant conflict between some federal policy or interest and the use of state law" as is required under both *O'Melveny* and the well-established *Kimbell Foods* test. *Id.* Incredibly, the Ninth Circuit did not even mention *Kimbell Foods*.

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[5] (Pet. App. 23a) ("*O'Melveny* concerned only the rule which governs a receiver's prosecution of claims on behalf of the corporation under its control—a fact situation with absolutely no relevance to this case." . . . "the Court . . . focused on the FDIC receivership statute. . . . [I]n light of that specific statute, the Court found no basis for a common law of imputing fraud to a corporation."). *See also, U.S. v. Northrop Communication*, 59 F.3d 953, 961 at n.4 (1995) ("In O'Melveny, the Supreme Court carefully qualified the dicta quoted above with the statement that the state law only presumptively controls to fill gaps in detailed statutory schemes.").

The Ninth Circuit has substituted, in place of the *O'Melveny* and *Kimbell Foods* tests, its own peculiar notion of the "broad equitable powers" and "wide discretion" attributable to the federal courts in the administration of receiverships. Yet the Ninth Circuit never explains why, in the first instance, it may resort to this "broad equitable power" when deciding substantive rights, or why such broad administrative powers enable a federal receiver to do that which a state court-appointed receiver never could —dispose of real property in contravention of co-owners' rights under state law. In stark contrast to this Court's ruling in *O'Melveny* (and now *Atherton*), the Ninth Circuit's ruling provides that the District Court had the power to promulgate a federal rule of decision which supplanted Petitioners' state law property rights simply because the property in which Petitioners have an interest was in the possession of a receiver appointed by a federal court, who had succeeded to the state-created property rights of the insolvent wrongdoer.

Mere possession and control of receivership property cannot give a receiver the right to sell what the receivership estate does not own. *O'Melveny* makes clear that neither federal jurisdiction over the insolvent entities now in receivership, nor the Receiver's appointment by a federal rather than a state court, gives the federal district court the authority to create new, federal common law to decide the substantive, state-created property rights of innocent third parties asserting state law claims against the receiver in the receivership action. In *O'Melveny*, where ". . . the FDIC was asserting . . . [negligence] causes of action created by California law", this Court stated that

> the remote possibility that corporations may go into federal receiverships is no conceivable basis for adopting a special federal common law rule divesting States of authority over the entire law of imputation.

O'Melveny, 512 U.S. 79, 114 S.Ct. at 2052-2053. *See also, Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-647, 101 S.Ct. 2016, 2067-2070 (1981).

The same is true of the state-created claims in this case. The mere happenstance that a federal, rather than state, receivership was imposed upon the insolvent entities in this case, was found by the Ninth Circuit to be determinative of the defrauded investors' substantive rights. Yet, this is clearly not the law after *O'Melveny*, nor was it even the law in any other Circuit prior to *O'Melveny*. Rather, under this Court's well-established precedents, the lower federal courts are presumptively required to borrow the applicable rule of state law, either in the first instance because federal common law may not be applied at all or, in the second instance, because any federal rule of decision adopted should incorporate the state law as its content, in accordance with established principles of federalism.[6]

Finally, the Ninth Circuit's holding that "*O'Melveny* does not control the instant case", (Pet. App. 23a), is plainly wrong. This Court made clear in *O'Melveny* that its ruling was not restricted to the facts of that case, despite the Ninth Circuit's attempt to impose such limits in this case.

> It seems to us . . . inefficient to pretermit the retroactivity issue on the basis of the FDIC's concession [that FIRREA would be applicable], since that would make our decision of limited value in other cases. As we proceed to explain, even assuming the inapplicability of FIRREA this is not one of those cases in which judicial creation of a special federal rule would be justified.

O'Melveny, 512 U.S. 79, 114 S.Ct. at 2055. Moreover, this peculiar Ninth Circuit limitation on *O'Melveny* will, no doubt, in the Ninth Circuit's view, also apply to *Atherton*, since the FDIC brought suit in both cases, and, according to the Ninth Circuit, this means the opinions have "absolutely no relevance" to receivership cases where the receiver is sued under state law. Pet. App. 23a.

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[6] *See* cases cited at footnote 3.

A. The Ninth Circuit Improperly Created Federal Common Law by Fiat, Holding It Was Unnecessary to Identify a Conflict Between a Uniquely Federal Policy or Interest and State Law

In *O'Melveny*, this Court made clear that

> what is fatal to respondent's position is that it has identified no significant conflict with an identifiable federal policy or interest. . . . Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.

512 U.S. 79, 114 S.Ct. at 2054. Here, the Ninth Circuit applied a judge-made federal common law rule of decision without even discussing, let alone establishing, the existence of any uniquely federal interest or policy that would require a federal court to fashion a federal rule of decision. In flat contradiction of this Court's precedents, the Ninth Circuit's ruling is nothing more than a willingness to justify any action by a federal receiver, rather than "interfere" with the receiver's unfettered discretion.

The true breadth of the Ninth Circuit's new rule becomes apparent when one realizes that the facts of this case evince *absolutely no* federal policy or interest, as opposed to the far stronger, yet still insufficient facts in *O'Melveny*, where at least the FDIC, as receiver, was asserting its quickly rejected "more money" for the government rationale. *Id.* at 2052. Here, the Receiver was defending a real estate sale to a third party against claims of title brought by his beneficiaries and innocent real property co-owners under California law. There was *no money* to be had for the government; indeed, once the fraudulent scheme had been shut down, there was no identifiable government interest at all. In *O'Melveny*, the FDIC was asserting the bank's claims on behalf of the estate against alleged wrongdoers in an attempt to secure as great a sum as possible for the innocent victims and the United States as insurer; any monies obtained would inure to the benefit of the United States' fisc. Here, even that insufficient federal interest is not present. The Receiver was simply administering the estate of an insolvent California

corporation and related partnership entities. The parties whose property rights he sought to foreclose were actually the victims of the fraud of the insolvent receivership estate —the entity to whose rights the receiver had succeeded. Thus, this case presents an even stronger argument against application of federal common law than even *O'Melveny*, in which this Court reiterated that ". . . there is no federal policy that the [FDIC] fund should always win." So, too, there is no federal policy that the receiver should always win in a dispute over state created property rights. *O'Melveny*, 512 U.S. 79, 114 S.Ct. at 2055.

Finally, in the case below the insolvent wrongdoers had long since disappeared from the scene, and the only interest the receiver was asserting was *his own interest* (on behalf of the insolvent corporation) in maximizing the insolvent corporation's fisc by selling the property in his possession, without having to take into account petitioners' unquestioned property rights therein under California law, or the fact that the Receiver was acting as a fiduciary for the Petitioners.

Neither the Ninth Circuit nor even the Receiver himself contended in this case that the Receiver in any sense represented the United States or its interests. To emphasize the point, in *O'Melveny*, this Court rejected the contention that the FDIC, when acting not in its corporate capacity but as receiver for a failed bank, was asserting the rights of the United States:

> [T]he FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its own rights rather than, as receiver, the rights of [the failed bank].

Id. at 2053. *Atherton* confirms *O'Melveny's* instruction on this point. *Atherton*, —— U.S. ——, 1997 WL 9781, at p.9. Here, the Receiver's only uniquely federal interest or attribute is his appointment by a federal court rather than a state court.

Because the facts of this case disclose nothing more than litigation of entirely state law claims between pri-

vate parties, there is no federal policy or interest at stake. As a result, the Ninth Circuit could not apply federal common law to deprive petitioners of their substantive rights under California law.

B. Application of the Federal Common Law Rule Created by the Ninth Circuit in This Case Will "Disrupt Commercial Relationships Predicated On State Law"

The Ninth Circuit's unbridled deference to a federal receiver cannot justify a federal common law to displace clear California law and deprive innocent parties, whose misfortune was to co-own property with the insolvent receivership estate, of their state law property rights. Such a result would enable a federal, but not a state-appointed, receiver to disregard all the state law property rights of any party or creditor or other person having an interest in a federal receivership. The rights have been created by the State of California as sovereign. As this Court has repeatedly held, federal courts may not cavalierly substitute judge-made, federal rules of decision, where "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99, 111 S.Ct. 1711, 1717 (1991). There are few interests less federal in character than a cause of action brought under state law to enforce state law created property rights.

In a federal receivership action in the Ninth Circuit, state law rights now mean nothing. The decision establishes law that clearly will "disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-729.

II. THE NINTH CIRCUIT HAS RENEWED AND INTENSIFIED THE CONFLICT AMONG THE CIRCUITS THAT EXISTED PRIOR TO *O'MELVENY & MYERS* AND *ATHERTON*

Prior to this Court's *O'Melveny* ruling, there existed a clear conflict among the Circuits regarding the power of

a federal court to apply federal common law to create federal rules of decision in receivership actions, in derogation of the state-created rights of parties before the court in the receivership action. Prior to that ruling, the Ninth Circuit's first *O'Melveny* opinion, *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), conflicted squarely with the Fifth Circuit's opinion in *Ernst & Young v. FDIC*, 967 F.2d 166 (1992).

The very same peculiar, individualized notions of "equity" invoked by the Ninth Circuit to support its first *O'Melveny* opinion have been even more broadly claimed in the instant case. The Ninth Circuit here went beyond its first *O'Melveny* opinion to hold that the "broad equitable powers" of the federal court, in *any* receivership action which it administers, are the source from which flows the clear and unmistakable power to fashion its own federal common law rule of decision which terminates the state-created property rights of innocent co-owners of property in the possession of the receiver.

Both prior to and following this Court's ruling in *O'Melveny*, Circuit Courts of Appeals other than the Ninth Circuit have properly refused to grant such unfettered power to the lower federal courts. These cases "recognize that *O'Melveny* constricts the ability of a federal court to craft a uniform federal rule." *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 11, at n.9 (2d. Cir. 1996). *See DiVall Insured Income Fund, Ltd. Partnership v. Boatmen's First Natl. Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995); *RTC v. Diamond*, 45 F.3d 665, 671 (2d Cir. 1995), *cert. denied*, —— U.S. ——, 115 S.Ct. 2609, 132 L.Ed.2d 853 (1995); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1696, 131 L.E.2d 559 (1995); *FDIC v. Massingill*, 30 F.3d 601, 604 (5th Cir. 1994); *RTC v. Maplewood Invs.*, 31 F.3d 1276, 1294 (4th Cir. 1994). The Ninth Circuit has squarely resurrected the very same conflict that existed prior to this Court's *O'Melveny* ruling. Furthermore, by seeking to limit *O'Melveny* to its own facts, the Ninth

Circuit has deepened the conflict among the Circuits even after *O'Melveny* by applying its own, limited version of *O'Melveny* in the Ninth Circuit while other Circuits apply the more expansive version intended by this Court. Finally, by apparently limiting *O'Melveny* to its own facts, the Ninth Circuit has invited not only the other Circuit Courts of Appeals but also the lower courts within the Ninth Circuit, which had, of course, been properly applying *O'Melveny*, to do the same.[7]

Given the clear and unmistakable import of this Court's *O'Melveny* opinion, the Ninth Circuit's limitation on the ruling is both plain error and cause for grave concern. *Atherton* is unlikely to chasten the Ninth Circuit; the court will simply place the same limitations on *Atherton* that it did on *O'Melveny*. This Court should utilize this case to resolve the obvious conflicts created by the Ninth Circuit's continuing attempts to construe *O'Melveny* narrowly.

III. THE NINTH CIRCUIT'S UNFOUNDED ASSERTION OF AUTHORITY TO PROMULGATE FEDERAL COMMON LAW IN *ANY* FEDERAL RECEIVERSHIP CASE CONTRAVENES BOTH THE UNITED STATES CONSTITUTION AND THE EXPRESSED INTENT OF CONGRESS

The principle enunciated by the Ninth Circuit in this case—that a federal court supervising any federal receivership may create and apply its own federal common law to displace state-created substantive property rights of co-owners of property in the hands of a receiver—is broad

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[7] The district courts in the Ninth Circuit have been following this Court's rulings, as expressed in *O'Melveny* and the other cases in the *Erie-Kimbell Foods-O'Melveny-Atherton* line of cases. In the Ninth Circuit, at least, the district courts will now be forced to question whether they or the Ninth Circuit have been misreading and mis-applying *O'Melveny*. *See, e.g., James v. Metropolitan Life Insurance Co.*, 896 F. Supp. 1006, 1008-1009 (D. Nev. 1995); *RTC v. Blasdell*, 930 F. Supp. 417, 429 (D. Ariz. 1994). *See also, Remington Investments, Inc. v. Kadenacy*, 930 F. Supp. 446, 450-451 (C.D. Cal. 1996).

indeed. The breadth of this new principle stands in stark contrast to the narrow interpretation the Ninth Circuit gave this Court's ruling in *O'Melveny*. Given the facts of the respective cases, moreover, it appears that the Ninth Circuit has announced a rule far broader than even the one it announced in its first *O'Melveny* decision. In so doing, it has fundamentally altered U.S. Constitutional law as it applies to receiverships administered by federal courts.

As this Court has reminded on several occasions, "federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee*, 451 U.S. at 312, 101 S.Ct. at 1790. Yet, the Ninth Circuit's ruling seeks to alter fundamentally the role of the federal courts in our governmental system. By limiting *O'Melveny* to its own facts and so emphatically endorsing the usurpation of petitioners' property rights ("we affirm the District Court's rulings without hesitation,") Pet. App. 10a, the Ninth Circuit has given the district courts in the Ninth Circuit a blank check to disregard state law-created property and contract rights, where the federal court is acting to approve the actions of a federal receiver, and "in the interests of equity" as defined only by the court itself (and, presumably, the Ninth Circuit). Neither the laws of the State of California which, as sovereign, created the property rights in issue, nor 28 U.S.C. § 959(b), the statute enacted by Congress, which has directed that these state rights must be respected by federal receivers, can prevent federal courts in the Ninth Circuit from fashioning judge-made, federal rules of decision pursuant to their "broad equitable powers" to administer receivership actions.

This Court, in *O'Melveny* and *Atherton* and their predecessors, has consistently and unanimously rejected such judicial attempts to assert lawmaking powers our federal system reserves for Congress and the State. Despite *O'Melveny*, the Ninth Circuit nevertheless has again raised the issue whether a judge-made federal rule regarding the

rights of a receiver to alter substantive legal relationships created under state law should be substituted in place of the state law which created the rights in issue. This Court should put to rest the Ninth Circuit's improper repudiation of controlling law.

Any federal rule of decision created in this case could and does have one and only one source—the "broad equitable powers" of the district court. Pet. App. 22a. More importantly, that power, in the context of receivership actions, at least, would not be subject to any limitations at all, other than the district judge's own, unfettered discretion. The Ninth Circuit's decision also contradicts the clear pronouncements of this Court's *Kimbell Foods-O'Melveny* line of cases and, as a result, creates in the federal courts a power which neither the Constitution nor Congress has conferred.

The Ninth Circuit's ruling below also contravenes the expressed intent of Congress. This Court's decisions consistently emphasize that although federal courts are, in "few and restricted" instances, permitted to apply federal common law rules of decision, in doing so, "even . . . where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress." *Northwest Airlines*, 451 U.S. at 96; 101 S.Ct. at 1583.

> Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.

Id., at n.34.

> Federal common law is only a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

City of Milwaukee v. Illinois and Michigan, 451 U.S. at 314; 101 S.Ct. at 1791.

The Ninth Circuit's ruling not only directly undermines this Court's rulings in *O'Melveny* and its predecessors but also contravenes Congress' will as embodied in 28 U.S.C. § 959(b). Section 959(b) explicitly directs receivers appointed by federal courts to apply state law in the management and operation of the receivership estate. In so legislating, Congress has explicitly recognized the States' rights and interests, as sovereigns, to exclusively both create and enforce property and contract rights. It is far beyond the scope of the power and authority of the federal courts to flatly ignore the expressed intent of Congress by giving federal receivers the authority to usurp state-created property and contract rights.

A. The Sole Cited Basis for the Ninth Circuit's Usurpation of State Common Law Is a Misquoted Treatise on Receiverships

Finally, having concluded that "federal common law" allowed the Receiver to sell the properties, the Ninth Circuit then attempted to erect a facade that it was merely applying a settled principle of state receivership law. Relying exclusively on a well known treatise on receiverships, the Ninth Circuit purported to show that the sale could have taken place the same way in a California state court receivership. However, while the court cited various sections of the treatise, including Section 482, it omitted to mention a critical sentence in that section: "The receiver can only sell the right, title and interest of the defendant whose property has been placed in the hands of the receiver or the interest of proper parties to the cause." 2 *Clark on Receivers* § 482 (3d ed. 1992). The court did not analyze or review California law pertaining to a receiver's power to sell property not part of the estate. Nor did the court review the decisions of this Court which have also held that a receiver merely takes over the rights and is subject to the defenses of the entity in receivership. *Marshall, as Receiver v. New York*, 254 U.S. at 385; 41 S.Ct. at 145.

Had the Ninth Circuit properly quoted Clark or reviewed the receivership law of California or any State of

the Union, and this Court's prior decisions, it would have found that it is universally accepted that a receiver does not have the power to do what the Receiver did in this case. Without citation to a single case, and without applying the tests which this Court has said must be applied for federal common law to be found, the Ninth Circuit announced a new "federal" common law of receiverships that permits federal court receivers to sell property in the receivership in violation of the state law rights of others having an interest in the property.

In fact, California law plainly provides, as held by numerous decisions of the California courts, that a receiver has no greater rights than the predecessor entity he or she was appointed to take over. *See, e.g. Allen v. Ramsay, supra, Downey v. Humphreys*, 102 Cal. App. 2d 323, 336, 227 P.2d 484, 494 (1951); *California National Bank of Sacramento v. El Dorado Lime & Minerals Co., et al.*, 213 Cal. 494, 496, 2 P.2d 785, 786 (1931); *People v. California, etc. Trust Co.*, 168 Cal. 241, 246, 141 P. 1181, 1183 (1914); *Bories v. Union Building & Loan Ass'n*, 141 Cal. 74, 74 P. 552 (1903). As a result, California courts would rule that, under California law, a receiver cannot dispose of property belonging to others in the receiver's possession without their consent. But the Ninth Circuit plainly transgressed both this Court's established precedents, the applicable state law, and the federal statute directing federal receivers to comply with applicable state law governing the property in their possession, choosing instead to apply its own federal rules of decision regarding petitioners' substantive property rights.

IV. THERE IS NO QUESTION THAT A SALE CONFIRMATION ORDER IS IMMEDIATELY APPEALABLE AS A FINAL ORDER

Ignoring century old, unquestioned and dispositive authority of this Court, the Ninth Circuit debated whether or not it had jurisdiction to hear petitioners' appeal of the sale order and then failed to answer the question, but went on to hear the case based on "hypothetical jurisdic-

tion." In fact, this Court has held that a receivership sale order is appealable as a final order as a matter of right. *First National Bank v. Shedd*, 121 U.S. 74, 7 S.Ct. 807, 30 L.Ed. 877 (1886); *Sage v. Railroad Company*, 96 U.S. 712, 714, 24 L.Ed.2d 641 (1877). These decisions have been recognized as the law for over one hundred years. *See, e.g., U.S. v. Grable*, 25 F.3d 298, 301 (6th Cir. 1994). Initially, when the Ninth Circuit did an about face and reversed its erroneous dismissal of the Investors' appeals, it clearly recognized that *Shedd* and *Sage* controlled. Yet the Ninth Circuit saw fit in its final decision to reverse course again and disregard Supreme Court precedent, finding a "tension" between this Court's decisions and its own rule in *SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349 (9th Cir. 1987) Pet. App. 11a. It resolved the "tension" by following its own rules, rather than the rules of this Court. The Ninth Circuit ignored this Court's binding precedents. A sale order is a final appealable order. There was no need for "hypothetical jurisdiction."

V. THE INVOCATION OF THE "ASSUMED APPELLATE JURISDICTION" DOCTRINE WAS UNNECESSARY AND IMPROPER

It requires no citation of authority to state that all federal courts are courts of limited jurisdiction which ought, in the first instance, to satisfy themselves of their own jurisdiction. This Court approved an exception to that rule in *Norton v. Mathews*, 427 U.S. 524, 528-30 (1976), finding that the court could reach the merits based on an assumption of jurisdiction where (1) the resolution of the jurisdictional issue was not outcome determinative; and (2) prudential concerns argued against addressing complex and unsettled jurisdictional issues. The existence of complex and unsettled issues has uniformly been held to be the pre-requisite of the application of the *Norton* doctrine. *See Browning-Ferris Ind. v. Muszynski*, 899 F.2d 151, 155 (2d Cir., 1990): *Norton* endorses the "practice of avoiding difficult and sweeping jurisdictional questions in favor of deciding clear cut and narrow issues on the

merits." Where the jurisdictional issue is not difficult, bypassing jurisdictional issues is expressly disapproved. *Tisza v. Communications Workers of America*, 953 F.2d 298, 300 (7th Cir. 1992) (District court jurisdiction). The other Circuits have similarly treated the *Norton* doctrine as a rare exception to the practice of establishing the court's jurisdiction before proceeding to the merits dependent on the existence of complex and unsettled jurisdictional questions. *See, e.g., Cross-Sound Ferry Services, Inc. v. I.C.C.*, 934 F.2d 327, 333 (D.C. Cir. 1991).

The court below has clearly mis-used the *Norton* doctrine since there is no credible case that a sale confirmation order is other than final. The suspicion is unavoidable that the invocation of *Norton* here reflects a desire to create a alternate and equally unfounded basis to deny the Petitioners their State law rights in the event that actions in this Court make it necessary for the Ninth Circuit to revisit this case. *See* the Ninth Circuit's per curiam Opinion on remand in the *O'Melveny* case for a similar approach.

The *Norton* doctrine does not exist as an excuse for a Court to avoid admitted jurisdiction which it does not wish to exercise, but rather to avoid unnecessary "sweeping jurisdictional questions in favor of deciding clear cut and narrow issues on the merits." *Browning-Ferris*, 899 F.2d at 155. Such circumstances simply are not present in the case at issue. Here, the Ninth Circuit has elected to avoid an easy and long settled jurisdictional issue in its rush to make a sweeping, unlawful and dangerous ruling on the merits.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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January 21, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 95-55193, 95-55283, 95-55872 and 95-55878

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

AMERICAN CAPITAL INVESTMENTS, INC.; STEPHEN J. MURPHY; KENNETH A. SORENSEN; RICHARD D. OTTO; ADFIN CORPORATION; EINHORN & EDGERTON,
Defendants,

and

JOHN P. SHELTON; ACI INVESTORS PROTECTIVE ASSOCIATION, AND APPROXIMATELY 127 ACI (AMERICAN CAPITAL INVESTMENTS) INVESTORS,
Defendants-Appellants,

v.

RICHARD G. SHAFFER,
Defendant-Appellee.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

AMERICAN CAPITAL INVESTMENTS, INC.; JOHN P. SHELTON; ACI INVESTORS PROTECTION ASSOCIATION, AND APPROXIMATELY 127 ACI (AMERICAN CAPITAL INVESTMENTS) INVESTORS,
Defendants-Appellants,

RICHARD G. SHAFFER,
Appellee,

and

STEPHEN J. MURPHY; KENNETH A. SORENSEN; RICHARD D. OTTO; ADFIN CORPORATION,
Defendants.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

AMERICAN CAPITAL INVESTMENTS, INC., *et al.*,
Defendants.

JOHN SHELTON; ACI INVESTORS PROTECTIVE ASSOCIATION AND APPROXIMATELY 156 ACI INVESTORS,
Appellants,

v.

RICHARD G. SHAFFER, COURT APPOINTED RECEIVER FOR DEFENDANT AMERICAN CAPITAL INVESTMENTS, INC.,
Appellees.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

and

JOHN P. SHELTON, ESQ.; APPROXIMATELY 156 ACI INVESTORS; ACI INVESTORS PROTECTIVE ASSOCIATION,
Appellants,

v.

AMERICAN CAPITAL INVESTMENTS, INC., *et al.*,
Defendants,

and

RICHARD G. SHAFFER, COURT APPOINTED RECEIVER FOR DEFENDANT, AMERICAN CAPITAL INVESTMENTS, INC.,
Appellee.

Appeals from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
D.C. No. CV 93-5280-CBM

Argued and Submitted Aug. 6, 1996
Decided Oct. 22, 1996

Before: FLETCHER and TASMIMA, Circuit Judges, and RESTANI,* Court of International Trade Judge.

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* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

OPINION

TASHIMA, Circuit Judge:

These cases consist of four consolidated appeals from orders of the district court in a receivership proceeding which was part of a Securities and Exchange Commission ("SEC") civil enforcement action. These appeals stem from the efforts of appellants, defrauded investors ("Investors") of American Capital Investments, Inc. ("ACI"), to upset a judicial sale of ACI-owned real property by appellee Richard G. Shaffer ("Shaffer"), the court-appointed receiver for ACI ("Receiver"). The appeals are from orders: (1) confirming the sale ("Sale Order"); (2) refusing to set asid the Sale Order ("Rule 60 Order"); (3) authorizing an addendum to the sale agreement ("Addendum Order"); and (4) transferring the Investors' claims to the proceeds of the Receiver's sale ("Transfer Order").

We have jurisdiction over the timely appeal from the Transfer Order under 28 U.S.C. § 1292(a)(1). We assert "hypothetical jurisdiction" over the appeals from the remaining orders, as discussed more fully below. We dismiss in part and affirm in part.

I. BACKGROUND

The SEC enforcement action alleged that ACI violated federal securities laws through sales of interests in real estate investments. The SEC prayed for, *inter alia,* the appointment of a receiver to take control of ACI-related assets. The district court first appointed Shaffer as ACI's temporary receiver, and later as permanent receiver, pursuant to Fed.R.Civ.P. 66 and its general equitable jurisdiction. The Receiver was empowered under 28 U.S.C. § 754 to take possession and control of all assets "belonging to or in the possession or control of ACI and its subsidiaries and affiliates." As required by § 754, the Re-

ceiver filed receivership notices in the districts where ACI's real properties were located.

Through imposition of the receivership, the SEC sought to protect ACI's creditors and some 200+ investors from the dissipation of ACI's assets and to provide for their compensation.

ACI's fraudulent scheme purported to offer Investors joint ventures and limited partnerships in specific real estate projects. In reality, the money raised went into an undifferentiated pool. Much of the money raised was used for unrelated, extravagant expenses and to pay off prior investors. ACI's commingling of funds made it impossible to trace whose money went to which real estate purchase. ACI had guaranteed its investors considerable "profits" on their investment, which could be reinvested at the election of the investor. However, the amount ACI owed its investors greatly exceeded the actual equity of ACI's real estate investments.

By consent judgments, the ACI defendants disgorged their interests in ACI. The district court terminated the underlying fraud case, but continued the receivership, and previously issued injunctive relief.

In early 1994, the Receiver negotiated an agreement with JH Financial Group ("JH") to convey to JH 100 percent fee interests in all eight ACI real properties that remained in the receivership estate (the "JH sale"). The JH sale was opposed by the Investors, who believed that holding the properties until the real estate market improved would realize a higher return. The Investors began mobilizing against the proposed sale.

Around the same time, the Receiver moved for permission to treat all Investors equally in the division of the proceeds from the sale of ACI assets. The Investors did not oppose this motion.[1] The district court granted the

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[1] Indeed, a letter circulated by leaders of the Investors supported the equal treatment of all ACI investors in the division of ACI's

motion in its Order Permitting Receiver to Consider All ACI Investors Equally ("Equal Treatment Order"). The Equal Treatment Order provided that each investor's recovery would be a pro-rata share, based on his or her net investment. No investor appealed the Equal Treatment Order.

The court then turned to the two-step process mandated by 28 U.S.C. § 2001 for approving the sale of receivership property—the appointment of appraisers to appraise the properties, followed by a sale confirmation hearing.

As part of their efforts to thwart the JH sale confirmation, the Investors applied for leave to intervene, file a petition for involuntary bankruptcy, and record warranty deeds to the properties held by some of the Investors. The district court denied intervention and cleared the "wild" warranty deeds (which the Investors were obligated to reconvey to ACI under the investment agreements) from the properties' title. In confirming the sale, the court also denied appellants' application to institute bankruptcy proceedings against ACI. The Investors took no appeals from the orders denying their application to intervene and to record the warranty deeds.

At the sale confirmation hearing, the Investors argued that the Sale Order would exceed the district court's jurisdiction because the Receiver could not deliver legal title to the real properties. Of the eight properties, five were wholly owned by ACI, but title in three was jointly held by ACI and three limited partnerships between ACI and selected investors. The Receiver initially argued that as receiver for ACI, the General Partner of these partnerships, he exercised the authority of the General Partner to convey title to the three properties.

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assets, whether their interests were in the form of deeds, limited partnership interests, notes, or preferred shares in ACI or affiliated entities.

Details about the state of these partnerships and the state of ACI's title emerged over the months that followed the sale confirmation hearing. All three limited partnership agreements provided for the partnership's dissolution upon the appointment of a receiver for the General Partner. It eventually came to light that two of these limited partnerships were never lawfully formed for lack of the proper filing of papers that ACI should have filed with the state.[2]

The Investors also argued that the Receiver had not adequately marketed the properties to obtain the best price, and had actually suppressed bidding in favor of the JH sale. They purported to show that the JH sale would not yield sufficient cash proceeds to satisfy the claims of Investors, commercial creditors, or even administrative creditors.

The Investors presented an alternate, supposedly preferable, proposal for the disposition of the properties—transfer of the properties to the Investors. They sketched a plan to pay all non-investor claims in full and to accept the ACI real properties subject to existing mortgages in satisfaction of their own fraud claims against ACI.

In the Sale Order, relying in part on ACI's powers as the General Partner of the limited partnerships, the court concluded that it had jurisdiction and authority, as a federal equity receivership court, to order the sale of the limited partnerships' interests in the properties. As to the merits of the sale, the district court found that the JH sale met the statutory requirements of a purchase price of at least two-thirds of the appraised value, and that the sale served the best interests of the Investors and creditors. Citing financing uncertainty, it rejected the Investors'

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[2] Further, in one property where record title was held solely by ACI, there allegedly existed approximately 40 unrecorded grant deeds for small, fractional fee interests in the names of individual investors.

proposal as inadequate under 28 U.S.C. § 2001. Citing their lack of detailed plans for satisfying the claims of creditors, it also found that the Investors' proposal was not in the interests of the estate.

The Investors thereafter moved under Fed.R.Civ.P. 60 to set aside the Sale Order. They argued that the limited partnerships had dissolved upon appointment of the Receiver and that the dissolution terminated ACI's status as General Partner, thus, foreclosing the Receiver's ability to convey the properties without the consent of the Investors. The Investors also asserted that the Receiver had abandoned jurisdiction over the ACI real properties by failing to file timely notice in the various districts where the properties were located, as required by 28 U.S.C. § 754. Lastly, the Investors renewed their attack on the "bad economics" of the JH sale.

The district court denied the Investors' motion in its Rule 60 Order. Relying upon the equitable powers of a federal receivership court, it concluded it had jurisdiction over the property interests of the limited partnerships and the partners. It also found the Receiver's § 754 filings to be timely, and reaffirmed the Sale Order in its other essentials.

The Investors appealed from the Sale and Rule 60 Orders, and applied to the district court for a stay of the JH sale, which was denied.[3] Thereafter, the Investors mounted a wide-ranging, extrajudicial campaign to thwart the sale's closing. Counsel for the Investors contacted the purchaser, title insurers, lenders and brokers involved in the JH sale to inform them of the Investors' claims and to warn them of future litigation challenging the conveyance.

Partly in response to this campaign, the purchaser backed off the initial closing date for the sale. The Re-

[3] This court never acted on appellants' subsequent motion before it for a stay of the JH sale pending appeal. That motion was dismissed as moot after the dismissal of the appeals.

ceiver then moved for the two other orders at issue on these appeals, the Addendum and Transfer Orders. The district court granted the Receiver's motions. The Addendum Order authorized the execution of an addendum to the sale agreement that: (1) confirmed a decrease in the purchase price by $250,000 in accordance with the terms of the original sale agreement; and (2) extended the closing date. It also clarified that language in the original sale agreement indemnified the purchaser against claims arising out of the sale, whether filed before or after the closing date.

The Transfer Order: (1) transferred all interests and claims of investors in the real properties to the proceeds of the JH sale; and (2) enjoined the Investors from filing claims to vindicate their interests, except against the receivership estate.

The JH sale closed on June 30, 1995. The Investors portray that sale as a financial disaster for the receivership estate and as a scandalous giveaway of valuable properties to a shrewd and unscrupulous purchaser.[4] The Investors proffer details about the manner of closing and the subsequent sale or foreclosure of ACI properties to show that the purchaser took unfair advantage of the Receiver in several different ways.

II. THE ISSUES RAISED

On appeal, the Investors contend that: (1) the district court exceeded its jurisdiction in confirming a sale purporting to convey title to real property in which the Investors had legal interests; (2) the district court abused its discretion in rejecting the Investors' alternative proposal for the disposition of the ACI real properties; (3)

[4] To this end, the Investors ask this court to take judicial notice of much information they have compiled since the closing about the JH sale and its aftermath. This information discloses the identity of the true purchaser of the ACI properties—an affiliate of the Belzberg family of Canada.

the district court abused its discretion by the use of an equity receivership to liquidate the ACI assets, instead of permitting the Investors to file a petition for involuntary bankruptcy; (4) the JH sale is void because it closed based on the Addendum and Transfer Orders, which the district court had no jurisdiction to issue after this appellate court had assumed jurisdiction over the Sale and Rule 60 Orders; (5) the Transfer Order exceeded the district court's jurisdiction; and (6) the district court deprived the Investors of their property interests and claims without due process of law.

III. JURISDICTION

At the threshold, this case presents three close questions of appellate jurisdiction: (1) whether jurisdiction lies under 28 U.S.C. § 1291 for the appeals from the Sale Order, Rule 60 Order, and Addendum Order; (2) whether these same appeals are now moot because the JH sale has closed; and (3) whether the appeal from the Sale Order was timely taken.[5] Asserting "hypothetical jurisdiction," we will reach the merits of all but two of the issues raised on appeal.

A. Hypothetical jurisdiction

We have applied "hypothetical jurisdiction" where jurisdiction is disputed to assume, without deciding, the existence of subject matter jurisdiction in order to reach the merits of an appeal. *In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 472, 133 L.Ed.2d 402 (1995); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir.1993). To assert hypothetical jurisdiction, we re-

[5] The Receiver concedes this court's jurisdiction over the appeal from the Transfer Order, which appellants assert lies under both 28 U.S.C. §§ 1291 and 1292(a)(1). The Receiver does not contend that the Transfer Order appeal is moot. Lastly, there is no question that the appeals from the Rule 60, Addendum, and Transfer orders were timely filed under Fed. R.App. P. 4.

quire four elements: (1) the jurisdictional question must be difficult; (2) the decision on the merits must be clear; (3) the appeal must be resolved against the party asserting jurisdiction; and (4) undertaking a resolution on the merits, as opposed to dismissing for lack of jurisdiction, must not affect the outcome. *Bailin,* 51 F.3d at 206.

These appeals satisfy all four elements. Appellate jurisdiction is uncertain on all but two issues that the Investors raise (not including issues relating to the Transfer Order, where jurisdiction is conceded). As we explain in Part IV, we affirm without hesitation the district court's orders. Finally, our decision on the merits is not outcome determinative. The JH sale stands, as it would on dismissal for lack of jurisdiction.

B. Statutory basis for appellate jurisdiction

Appellants assert 28 U.S.C. § 1291 as the basis for appellate jurisdiction over their appeals from the Sale Order, the Rule 60 Order, and the Addendum Order.

Two 19th century Supreme Court cases support appellants' position that a confirmation of sale order is a final, appealable order. *See First Nat'l Bank v. Shedd,* 121 U.S. 74, 85, 7 S.Ct. 807, 812-13, 30 L.Ed. 877 (1887) (sale order in receivership proceeding is appealable); *Sage v. Railroad Co.,* 96 U.S. 712, 714, 24 L.Ed 641 (1877) ("We have often decided that a decree confirming a sale, if it is final, may be appealed from. . . . For relief against the sale, resort can alone be had to an appeal from the decree of confirmation.").

These precedents find some support in late 20th century case law. *See In re American Colonial Broadcasting Corp.,* 758 F.2d 794, 801-03 (1st Cir.1985) (order authorizing negotiation to sell property not a final order, but parties can appeal from eventual sale confirmation order); *Los Angeles Trust Deed & Mortgage Exch. v. SEC,* 285 F.2d 162, 165 (9th Cir.1960) (citing § 1291, without analysis, as jurisdictional basis for appeals from

securities law violation judgments *and* receivership liquidation order), *cert. denied,* 366 U.S. 919, 81 S.Ct. 1095, 6 L.Ed.2d 241 (1961).

However, our decision in *SEC v. American Principals Holdings, Inc.,* 817 F.2d 1349 (9th Cir.1987), suggests, to the contrary, that the orders in this case are not final orders appealable under § 1291. In *American Principals,* the appellant objected to an order for payment to the receiver from the assets of the partnerships held in receivership, and to the authorization of a "spinoff" of some of the partnerships. *Id.* at 1350. Because the receivership proceedings remained ongoing, and because appellant could later recover the disputed payments through claims against the receivership estate, we held the order nonfinal. *Id.*

We assert hypothetical jurisdiction rather than address the unresolved tension between *Shedd* and *Sage,* on the one hand, and *American Principals,* on the other.

C. Mootness

Appellants have essentially conceded that effective relief from the Sale, Rule 60 and Addendum Orders depends on whether the JH sale can be set aside. A court must have the power to unwind the completed sale, or the appeals from these orders are moot.

There is no authority discussing the mootness effect of a sale's closing upon an appeal from a sale confirmation order in an equity receivership proceeding. There is, however, much authority in bankruptcy. The general rule in bankruptcy is that, unless the sale order is stayed pending appeal, the trustee's acts in accordance with that order should not thereafter be subject to reversal, even if the order is overturned on appeal. *Bennett v. Gemmill (In re Combined Metals Reduction Co.),* 557 F.2d 179, 188-89 (9th Cir.1977). Later cases citing *Combined Metals* also cite former Bankruptcy Rule 805, or its subsequent codification, 11 U.S.C. § 363(m):

> Unless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser . . . knows of the pendency of the appeal.

Fed. R. Bankr.P. 805 (superceded 1983).

We have acknowledged exceptions, albeit ill-defined, to this rule of mootness. In *Taylor v. Lake (In re CADA Inv., Inc.)*, 664 F.2d 1158 (9th Cir.1981), we held the appeal was not moot, despite the sale's closing in the absence of a stay, because the language of the sale contract expressly conditioned the conveyance on the outcome of the appeal from the sale confirmation order. *Id.* at 1160. We also relied on the fact that, "in contrast to other cases in which we have addressed comparable mootness problems, all essential parties are before the court." *Id.*

Case law interpreting *CADA Inv.* has been inconsistent on whether the purchaser's presence before the court is sufficient by itself to create an exception to the rule of mootness in the absence of a stay. In *Sulmeyer v. Karbach Enter. (In re Exennium, Inc.)*, 715 F.2d 1401 (9th Cir.1983), we read *CADA Inv.* to rest on the contractual language as the basis for the exception to the stay requirement. *See id.* at 1404. In contrast, *Sun Valley Ranches, Inc. v. The Equitable Life Assurance Soc'y (In re Sun Valley Ranches, Inc.)*, 823 F.2d 1373 (9th Cir. 1987), cited *CADA Inv.* and other cases for a general exception to mootness where the purchaser is a party to the appeal, even though there was no stay. *See id.* at 1375.[6]

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[6] These cases do not make clear whether, for the mootness exception to apply, the purchaser must be a party to both the district court proceedings and to the appeal.

Even if we ignore the limitation spelled out in *Exennium*, we cannot apply the exception set out in *CADA Inv.* and *Sun Valley* to save these appeals from mootness. Besides appellants' failure to obtain a stay of the JH sale pending appeal, all essential parties are not before the court.

The Investors point out that attorney Bruce Greene, who appeared before the district court for JH, was also the registered agent for the Belzberg affiliate that purchased the ACI properties.[7] However, the Investors' own requests for judicial notice demonstrate that at least three of the eight ACI properties included in the JH sale have since been resold or foreclosed upon.[8] These properties are no longer in the hands of the Belzbergs. The Investors represented at oral argument that the institutions that foreclosed on two of the properties appeared in district court and were thus properly "before the court." Assuming arguendo that this is so, there remains the Solano Beach property, resold by the Belzbergs to a third party whom the Investors acknowledge was never before the district court.

The JH sale conveyed eight bundled properties for the single price of $24.05 million. The Investors have not explained how this court can order the unwinding of this sale without voiding the conveyance of all eight properties. Their notion of imposing a constructive trust on the proceeds of the Solano Beach property that remain in the hands of the Belzbergs is untimely and inadequately presented.[9]

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[7] In response to appellants' unopposed request, we judicially notice this fact pursuant to Fed.R.Evid. 201(d). The Receiver acknowledged at oral argument that Greene was, during the relevant times in the proceedings below, acting as the registered agent of the Belzbergs.

[8] We judicially notice these facts pursuant to Fed.R.Evid. 201.

[9] At oral argument, the Investors for the first time raised the possibility of imposing a constructive trust on the proceeds from

The Investors raise another, more compelling basis for a mootness exception. Two of their contentions are that: (1) the district court did not have the jurisdiction and power to order the Receiver's conveyance of the Investors' interests in the real property; and (2) the sale was void because the district court lacked jurisdiction to issue the Addendum and Transfer Orders while the Sale and Rule 60 Orders were still on appeal. These contentions distinguish the instant case from the many cases applying the mootness doctrine to judicial sales closed in the absence of a stay. In those cases, the parties assigned error to the proceedings, but did not question the court's jurisdiction to conduct the sale in the first instance. *See, e.g., Sun Valley,* 823 F.2d at 1374; *Combined Metals,* 557 F.2d at 184-186.

A 19th century Supreme Court case supports the proposition that a sale confirmation order issued without subject matter jurisdiction may be set aside as void, notwithstanding the absence of a stay. *See Voorhees v. Jackson,* 35 U.S. (10 Pet.) 449, 9 L.Ed. 490 (1836). In *Voorhees,* in response to a challenge to the judicial sale of property, the Court held that the completed sale was not subject to collateral attack because the sale was conducted by a court of "competent jurisdiction of the parties [and] the subject matter, with authority to use the process it has issued. . . ." *Id.* at 35 U.S. (10 Pet.) at 474. The Court continued:

> The errors of the court do not impair [the proceedings'] validity: binding till reversed, any objection to their full effect, must go to the authority under which they have been conducted. If not warranted by the constitution or law of the land, our most

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the sale of property included in the JH sale, rather than voiding its conveyance. Because this theory was not briefed, we decline to consider it. *See* Fed. R.App. P. 28(a)(6); *Eberle v. City of Anaheim,* 901 F.2d 814, 818 (9th Cir.1990); *Simpson v. Union Oil Co.,* 411 F.2d 297, 900 n. 2 (9th Cir.), *rev'd on other grounds,* 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969).

> solemn proceedings can confer no right which is denied to any judicial act under colour of law. . . .

Id. If there is such a " 'want of jurisdiction, the proceedings are void and a mere nullity, and confer no right . . . and may be rejected when collaterally drawn into question.' " *Id.* at 477 (citation omitted).

Voorhees appears to allow a collateral attack on a jurisdictionally void sale, but does not address an attack on direct review. We believe, under the facts of this case, such direct review may be necessary to ensure that the Investors' jurisdictional challenges receive a fair hearing. The Transfer Order bars appellants from instituting any collateral attack on the sale. If the Sale Order and/or Addendum Order are void for lack of jurisdiction, then the Transfer Order is void, too, as an injunction in furtherance of a void order. Thus, a fair consideration of the appeal from the Transfer Order may require consideration of the jurisdictional powers of the equity receivership court to order the sale here. And only if appellants can successfully overturn the Transfer Order, can they be assured of a right to collaterally attack the conveyance.

Thus, *Voorhees* may preserve from mootness appellants' challenges to the jurisdiction of the district court to order the sale of the ACI properties. Without deciding, we assert hypothetical jurisdiction over these issues on this basis.

The Investors, however, raise other issues threatened by mootness. Out of an abundance of caution, we will also assert hypothetical jurisdiction over appellants' constitutional due process claims arising from the Sale, Rule 60, and Addendum Orders.[10]

But we do dismiss as moot appellants' two contentions that merely assign to the district court an abuse of its

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[10] Appellants also challenge on due process grounds the Transfer Order. The Receiver does not contend that this ground for appeal is moot.

discretion, and no unconstitutionality or lack of jurisdiction. We dismiss the issue of whether the district court abused its discretion under 28 U.S.C. § 2001, by rejecting the Investors' alternate plan for the disposition of the ACI properties in favor of the JH sale.[11] We also dismiss the issue of whether the district court abused its discretion by the use of an equity receivership to liquidate the ACI assets, instead of permitting the Investors to file a petition for involuntary bankruptcy.

D. Timeliness of notice of appeal from Sale Order

Appellants noticed their appeal from the Sale Order several days outside the general 30-day period of Fed. R.App. P. 4(a)(1). The Receiver contends that the appeal from the Sale Order should therefore be dismissed, because the 60-day period for a case where the government is a party is inapplicable here.

There is no case on point involving the timeliness of an SEC receivership order. Nonetheless, appellants' argument for applying the 60-day period is plausible, because the SEC initiated the receivership and has a direct regulatory interest in its outcome. *Compare Combined Metals,* 557 F.2d at 203-204 (IRS was a creditor, but had no interest in proceedings other than having its claim paid; therefore, 60-day period was inapplicable). The SEC filed papers adverse to the Investors in the receivership proceedings below.[12] *See id.*

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[11] Because we decline to decide this issue, we deny appellants' requests for judicial notice of facts purporting to establish the financial unreasonableness, and even scandalousness, of the JH sale. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992) (appeals court may notice facts if they have a direct relation to matters at issue).

[12] The SEC filed oppositions to the Investors' motions for leave to file deeds and to intervene, and to their motion to disqualify the Receiver.

We need not decide this question, as we assert hypothetical jurisdiction, assuming that the appeal was timely filed.

IV. MERITS

A. Jurisdiction to Convey Title

The key issue on the merits is whether the district court exceeded its jurisdiction in confirming the Receiver's sale purporting to convey title to real property in which appellants claimed legal interests. Appellants' challenges break down into two parts: (1) did the Receiver comply with the filing requirements of 28 U.S.C. § 754; and (2) does California partnership law or the federal law of equity receivership control the Receiver's power to convey title?

The jurisdictional limits to the district court's power in equity receivership proceedings are issues of law, reviewed *de novo*. *See SEC v. American Principals Holding, Inc. (In re San Vicente Medical Partners Ltd.)*, 962 F.2d 1402, 1406 (9th Cir.), *cert. denied*, 506 U.S. 873, 113 S.Ct. 210, 121 L.Ed.2d 150 (1992).

1. *Filing requirements of § 754*

Appellants contend that the Receiver lost jurisdiction over the sale properties by not timely filing receivership notices in the districts where the properties were located. Under 28 U.S.C. § 754, a receiver will be divested of jurisdiction over property in a district, unless he files notice in that district within 10 days of the entry of his appointment order.[13] The Investors assert that the 10-day period

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[13] This section provides, in relevant part:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such

commenced with Shaffer's temporary appointment as Receiver on September 2, 1993. That order was entered on September 10. The Receiver argues that the 10-day period commenced when his permanent appointment was entered on September 23. Shaffer made the § 754 filings on September 27.

No case addresses whether the 10-day period of § 754 commences after a temporary appointment, or only upon a permanent appointment. We need not reach this question. Even if Shaffer should have filed notice after his temporary appointment, his permanent appointment reestablished his jurisdiction, even before 10 days had elapsed from the entry of his temporary appointment. The entry of his permanent appointment order set a *new* 10-day period running. *See SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C.Cir.1996) (reappointment of receiver will start the ten-day clock of § 754 ticking anew). Further, appellants have not attempted to show prejudice from any late filing. *See United States v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir.1984).

We therefore conclude that Shaffer's filings on September 27, 1993, effectively maintained his jurisdiction over the properties.

2. *Power to convey partnership assets*

Appellants challenge the district court's assertion of jurisdiction to convey title to the three real properties owned in part by the limited partnerships in which the Investors had partnership interests. The district court twice addressed its jurisdiction to conduct a sale of partnership assets, first in the Sale Order and then in the

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order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 754.

Rule 60 Order. We address only its second, more considered ruling on this issue.[14]

Based on the minimum-contacts analysis of *Shaffer v. Heitner*, 433 U.S. 186, 208, 97 S.Ct. 2569, 2581-82, 53 L.E.2d 683 (1977), the district court found it had jurisdiction over the limited partners, the partnerships and their interests in property. It then concluded it had the power to include the partnership property in the Sale Order, based on *San Vicente*, 962 F.2d 1402.

In *San Vicente*, the district court ordered administrative expenses of an SEC receivership to be taxed to a limited partnership in which the receivership corporation was General Partner. The limited partners appealed, contending that the partnership agreement barred the General Partner from directing any such payments. In affirming, we rejected the limited partners' argument that the partnership agreement controlled under 28 U.S.C. § 959(b), which required the receiver to "manage and operate the property in his posesssion . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." *Id.* at 1408.

We first observed that "[g]enerally, federal courts enjoy wide discretion in fashioning relief and protective measures in SEC actions. . . ." *Id.* at 1406. We further held that the receivership order impliedly included not only the defendant corporation's property but also the limited partnership's property within the receivership estate. *Id.* at 1407. The district court had power to do so where there were sufficient contacts with the forum and notice and opportunity to participate. *Id.* at 1408.

Ultimately, we held that the receiver was *not* acting as the agent of the General Partner and thus required by

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[14] In the Rule 60 Order, the district court abandoned its prior reliance on ACI's status as General Partner of the limited partnerships as a basis for its power to confirm the sale.

§ 959(b) to assume the General Partner's role and legal relationship to the limited partnership. *Id.* at 1409. Rather, the receiver was acting as an officer of the court who directly controlled the limited partnership's property under the authority of an equity receivership. *Id.*

San Vicente supports the district court's exercise of jurisdiction in the case at bench. Appellants do not contest that there were minimum contacts between the forum and themselves, the partnerships, and the partnership property. Nor do they contest that there was notice and an opportunity to be heard. Here, the appointment order gave the Receivership possession and control of all assets "belonging to or in the possession or control of ACI and its . . . *affiliates*." (Emphasis added.) The partnership assets clearly fell within the scope of this order. The Receiver was therefore "vested with *complete* jurisdiction and control of all such property. . . ." 28 U.S.C. § 754 (emphasis added).

In selling the properties, the Receivership was exercising that "complete control." The Receiver was *not* acting as agent of ACI, the ousted General Partner. Consequently, neither the partnership agreement nor the California law of partnerships applies.[15] There is no conflict with § 959 (b), just as there was none in *San Vicente*.

It is true that *San Vicente* did not involve the receiver's conveyance of title to partnership real property. Nonetheless, we conclude that the power of sale is within the scope of a receiver's "complete control" over receivership assets under § 754, a conclusion firmly rooted in the common law of equity receiverships.

First, we follow the oft-cited general principle that "the district court has broad powers and wide discretion to

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[15] Although we conclude they have no legal significance, we judicially notice, pursuant to Fed.R.Evid. 201(d), the state-issued documents proffered by appellants to demonstrate that two of the limited partnerships were never lawfully formed.

determine the appropriate relief in an equity receivership." *SEC v. Lincoln Thrift Ass'n,* 577 F.2d 600, 606 (9th Cir.1978). As we have previously stated:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Reebok Int'l v. Marnatech Enter., Inc., 970 F.2d 552, 561-62 (9th Cir.1992) (quoting *Brown v. Swann,* 35 U.S. (10 Pet.) 497, 503, 9 L.Ed. 508 (1836)). Second, the leading treatise on the law of receiverships teaches:

> It is generally conceded that a court of equity having custody and control of property has power to order a sale of the same in its discretion. *The power of sale necessarily follows the power to take possession and control of and to preserve property,* resting in the sovereignty and exercised through courts of chancery, or courts having statutory power to make the sale.

2 *Clark on Receivers* § 482 (3d ed. 1992) (emphasis added) (citing *Shedd,* 121 U.S. at 87, 7 S.Ct. at 814). *Clark* also teaches that a receiver's sales do not even purport to convey "legal" title, but rather "good," equitable title enforced by an injunction against suit. *See* 2 *Clark on Receivers* §§ 342, 344, 482(a), 487, 489, 491.

> When a court of equity orders property in its custody to be sold, the court itself as vendor confirms the title in the purchaser. Neither the court nor [the receiver] gives a legal title to the purchaser because neither the court nor its officer has legal title to give. . . . A court of equity acts by a process of injunction against the owner and against the parties to the suit and protects the purchaser against interference and assures him a quiet title and quiet enjoyment.

Id. at § 487. *See also* 3 *Id.* § 920 ("When a receiver of a partnership sell property he sells as the arm of the court and not as holder of the legal title").

The JH sale thus was proper under the common law of equity receiverships and the reasoning of *San Vicente*. Appellants, however, make three, further arguments to the contrary.

First, they argue that the district court lacked the "full traditional *in rem* jurisdiction" necessary to transfer their property interests, noting that the district court in *San Vicente* exercised only *quasi in rem* jurisdiction in its order to tax costs. Appellants cite no authority for this alleged requirement.[16] Certainly a decree in equity cannot transfer title outside the court's territorial jurisdiction. 2 *Clark on Receivers* § 482. Here, however, the Receiver's filings under § 754 extended the court's territorial jurisdiction to each district where the properties were located. *See Vision Communications,* 74 F.3d at 288-90. The argument is meritless.

We turn now to appellants' second and third arguments, which are related—that there is no federal common law of receiverships. Consequently, they argue, a receiver does no more than "step into the shoes" of the receivership defendant under state law and can convey no more title than the defendant possessed. For support, appellants rely on *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), in which the Court held that state law, rather than federal law, governs the imputation of corporate officer's knowledge of fraud to a corporation, where the FDIC, as receiver, is prosecuting

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[16] Indeed, the major treatise suggests the contrary. *See 2 Clark on Receivers* § 482 (a decree in chancery for conveyance in land has never been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on a party); 1 *Clark on Receivers* § 47 (3rd ed. 1992) (receivership proceedings are *quasi in rem*).

the corporation's state causes of action. *Id.* at ——-——, 114 S.Ct. at 2052-53.

In declining to adopt a special federal rule of decision for imputation favorable to the FDIC, the Court first reaffirmed the unarguable proposition that "there is no federal general common law." *Id.* at ——, 114 S.Ct. at 2053 (quoting *Erie R.R. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938)). It then focused on the FDIC receivership statute, which provides than the FDIC shall "by operation of law, succeed to-all rights, titles, powers, and privileges of the insured depository institution. . . ." 12 U.S.C. § 1821(d)(2)(A)(i). "This language appears to indicate that the FDIC as receiver 'steps into the shoes' of the failed S & L" and is subject to any defense good against the original party. *O'Melveny,* 512 U.S. at ——, 114 S.Ct. at 2054. In light of that specific statute, the Court found no basis for a common law rule of imputing fraud to a corporation. *See id.* at ——-——, 114 S.Ct. at 2055-56.

O'Melveny does not control the instant case. *O'Melveny* concerned only the rule which governs a receiver's prosecution of claims on behalf of the corporation under its control—a fact situation with absolutely no relevance to this case. *O'Melveny* does not question the existence of other federal common law rules regarding the powers of equity receiverships. Appellants' assertion that "there is no federal common law of receiverships" is thus vastly overstated. As discussed above, the powers of sale of federal equity receivers are well-established.[17]

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[17] Appellants would also pose a conflict between the powers of sale of a federal equity receiver and those of an equity receiver under state common law. To the contrary, however, both types of receivers can conduct a judicial sale of real property that is properly within their "possession and control" and within the court's territorial jurisdiction, where all parties of interest have been brought before the court. *See 2 Clark on Receivers* §§ 482, 491.

We affirm the district court's jurisdiction and power as a federal equity receivership court to confirm the sale of the partnership assets.

B. Orders issued while other Sale Orders were on appeal

Appellants contend that the JH sale is void because it closed on the basis of the Addendum and Transfer Orders, amending the terms of sale, which were themselves void for lack of jurisdiction. The district court issued the Addendum and Transfer Orders after the Ninth Circuit had dismissed the Sale Order and Rule 60 Order appeals, but before the mandate issued. Generally, the filing of a notice of appeal divests the district court of jurisdiction over the matters appealed. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 401-02, 74 L.Ed.2d 225 (1982). The issuance of a mandate terminates appellate jurisdiction. Fed. R.App. P. 41.

However, a district court may exercise residual jurisdiction over a continuing course of conduct in order to preserve the status quo. *Pyrodyne Corp. v. Pyrotronics Corp.*, 847 F.2d 1398, 1403 (9th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988). Although it cannot adjudicate the substantial rights involved in the appeal, *id.*, where new facts are created by the parties, the maintenance of the status quo may require new action. *Hoffman v. Beer Drivers & Salesmen's Local Union 888*, 536 F.2d 1268, 1276 (9th Cir.1976).

In the case at bench, the Addendum Order: (1) confirmed a $250,000 sales price decrease that was a contingency in the origial sales agreement; (2) extended the closing date following a campaign of extrajudicial interference by the Investors with the sale; and (3) clarified, but did not alter, the terms of the idemnification provision in the sales agreement. These actions were proper under *Hoffman* and *Pyrodyne*. *See Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1480 n.14 (9th Cir.

1994) (order clarifying original injunction and supervising compliance is proper under *Hoffman*); *The Sansom Comm. v. Lynn,* 735 F.2d 1552, 1554 (3rd Cir.) (extension of time to purchase properties under consent decree is proper under *Hoffman*), *cert. denied,* 469 U.S. 1017, 105 S.Ct. 431, 83 L.Ed.2d 358 (1984). The Addendum Order did not materially alter the sale, but rather helped implement it.

The failure of appellants to gain a stay of the sale further supports the issuance of the Addendum and Transfer Orders to implement or enforce the earlier Sale Order. *See In re Grand Jury Subpoenas Duces Tecum,* 85 F.3d 372, 375-76 (8th Cir.1996) (district court retained power to enforce its earlier order notwithstanding appeal, under rule allowing jurisdiction to extent necessary to enforce a judgment not stayed). The Transfer Order's injunction barring the Investors from pursuing their property claims, except as against the receivership, embodies a routine means of quieting, that is, enforcing the title conveyed in a receiver's sale. *See* 2 *Clark on Receivers* § 487.

We conclude that the Addendum and Transfer Orders were properly issued pursuant to the district court's residual, supervisory jurisdiction.

C. Transfer Order

Appellants briefly, and without citation to authority, attack the merits of the Transfer Order.[18] We review permanent injunctive relief for an abuse of discretion. *United States v. Yacoubian,* 24 F.3d 1, 3 (9th Cir.1994).

Appellants argue that the injunction is: (1) in support of a void order; and (2) an improper exercise of control

[18] They also, again, attack the district court's jurisdiction. That argument has, however, already been dealt with above. The Transfer Order was within the district court's "broad powers and wide discretion to determine the appropriate relief in an equity receivership." *See Lincoln Thrift Ass'n,* 577 F.2d at 605-06.

over property not within the court's *in rem* jurisdiction. As discussed above, appellants have not shown the transfer of their interests and claims to be void. Further, the power of the district court to enjoin proceedings relating to interests in the receivership entities, when necessary to achieve the purposes of the receivership, was stablished in *SEC v. Wencke,* 622 F.2d 1363, 1369 (9th Cir.1980).

Appellants' challenge to the Transfer Order fails.

D. Due Process

Appellants contend that the district court deprived them of property interests without due process of law, in that: (1) plenary, not summary, proceedings were required for the district court to deprive them of their interests in property; and (2) their remedy for the ACI fraud was unconscionably limited to recovery against the receivership estate.

We review *de novo* whether the district court's exercise of jurisdiction as a federal equity receivership court deprived appellants of property without due process of law. *See San Vicente,* 962 F.2d at 1406.

For the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard. *SEC v. Wenke,* 783 F.2d 829, 836-38 (9th Cir.), *cert. denied,* 479 U.S. 818, 107 S.Ct. 77, 93 L.Ed.2d 33 (1986); *See also SEC v. Universal Fin.,* 760 F.2d 1034, 1937 (9th Cir. 1985) (where investors had been afforded virtually all procedural protections which would have been available in plenary proceedings, and had notice of the nature of the proceedings, it was not improper for the district court summarily to adjudicate investors' claims to notes).

Appellants cite *Arizona Fuels Corp.,* 739 F.2d 455, for the proposition that, while summary proceedings are ap-

propriate to determine the right to possession of receivership property, plenary actions must be filed to decide the ultimate rights to property. *See id.* at 458-59. However, *Arizona* Fuels did not present a situation involving the ultimate rights to property. *See id.* Therefore, statements in that decision purportedly requiring plenary actions are dicta. Moreover, *Arizona Fuels'* exception requiring plenary proceedings applies only to third parties *in possession* of the property. *See id.*

Even if plenary proceedings were appropriate, appellants can prove no due process violation without showing prejudice. *Wencke,* 783 F.2d at 837-38. Appellants must show how they were prejudiced by the summary proceedings and how they would have been better able to defend their interests in plenary proceedings. *Id.*

In the case at bench, the summary proceedings actually afforded to appellants gave them full notice and opportunity to be heard at every critical stage. Appellants have not even attempted to show prejudice arising from the nature of the proceedings.

Nor have appellants shown prejudice from their limited remedy to claims against the receivership estate. ACI's massive fraud left its investment ventures a mess of commingled funds, unrecorded deeds, and limited partnerships stranded in legal limbo. In response, the district court crafted a comprehensive equitable remedy to protect both creditors and investors. This remedy included the Equal Treatment Order, JH sale, and Transfer Order. *Cf. Official Cattle Contract Holders Comm. v. Commons (In re Tedlock Cattle Co.),* 552 F.2d 1351, 1352-53 (9th Cir.1977) (trustee of bankrupt Ponzi-scheme promoter's estate properly applied overriding federal law to apportion assets to all investors based on their shares of original investments).

Appellants have presented only one alternative to the district court's comprehensive scheme—their own last-

minute purchase proposal, which the district court found financially dubious and inattentive to the needs of creditors. It rejected the Investors' proposal only after full briefing, a hearing, and post-hearing supplemental briefing. Although we have dismissed as moot the issue of whether the district court abused its discretion in rejecting this alternate proposal, the district court's consideration of the issue satisfied constitutional due process.

Appellants have established no due process violation in the district court's treatment of their property interests.

V. CONCLUSION

We dismiss as moot appellants' challenge to the economic merits of the JH sale, and their contention that ACI's liquidation should have been handled in bankruptcy. On all other issues, we affirm the district court's four orders herein appealed.

DISMISSED in part, and AFFIRMED in part.

APPENDIX B

[Filed Jan. 30, 1995]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 93-5280 CBM (JRx)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

AMERICAN CAPITAL INVESTMENTS, INC.,
STEPHEN MURPHY, KENNETH SORENSEN,
RICHARD OTTO, and ADFIN CORP.,
Defendants.

ORDER RE: RULE 60(b) MOTION

This action was before the Court on a motion by certain investors of ACI to vacate and set aside pursuant to Fed. R. Civ. P. 60(b) two orders of this Court relating to the sale of property ("Orders"). On January 9, 1995, various parties appeared before the Court, and were heard. The Court took the motion under submission. Based on the arguments, papers, evidence and record presented to the Court, the Court denies the motion.

On September 17, 1993, this Court issued a preliminary injunction placing Defendant ACI in permanent receivership. Concurrent with the preliminary injunction, the Court issued findings of fact and conclusions of law. The Court found that Defendants had violated federal securities law in connection with the purchase and sale of securities to investors, and unless an injunction was granted, there was a reasonable likelihood that Defendants would engage in further violations. Based on the

facts of the case, including the misuse and misappropriation of investor proceeds, the Court found that the appointment of a permanent receiver over ACI was necessary and appropriate. The order of preliminary injunction appointed a receiver with "full power over all funds, assets, premises (whether owned, leased, occupied or otherwise controlled), choses in action, books, records, and other property belonging to or in the possession of or control of ACI and its subsidiaries and affiliates."

Defendant ACI owns eight parcels of property (collectively, "ACI Properties"), five in California and three in Florida. ACI holds full title to five of the parcels of property and shares title to three parcels with California limited partnerships, of which ACI was the general partner. JH Financial group has offered to purchase the ACI Projerties for $24.3 million ("JH Sale"). On August 26, 1994, following a hearing, the Court granted the Receiver's motion for an order authorizing the JH Sale. The Court's order approved the sale, based on the best interests of the ACI estate.

On November 30, 1994, following another hearing, the Court issued an order confirming the JH Sale. The Court rejected the investors' argument that the Receiver could not sell the ACI Properties held in part by limited partnerships, and found that the Court's exercise of jurisdiction over the limited partnerships did not violate due process. In addition, the Court rejected an alternate plan to purchase the ACI Properties proposed by investors of ACI. The Court further found that the JH Sale was in the best interests of the estate. Therefore, the Court confirmed the JH Sale, including sale of the properties not owned solely by ACI.

Certain investors of ACI now move the Court to vacate and set aside pursuant to Fed. R. Civ. P. 60 the orders authorizing and confirming the JH Sale. These investors ("Moving Investors") challenge both orders on four different grounds: (1) the Orders are void for lack of sub-

ject matter jurisdiction; (2) the Orders are based on mistakes of fact and law; (3) the entry of the Orders was procured by misrepresentation or fraud; and (4) the Orders are improvident and inequitable in light of newly discovered facts.[1] The Receiver opposes the motion.

Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment.

The Moving Investors bear the burden of proving the existence of a justification for Rule 60(b) relief. *See Cassidy v. Tenorio,* 856 F.2d 1412, 1415 (9th Cir. 1988). The Court finds that they have not carried this burden on any of the grounds asserted.

Jurisdiction

The Moving Investors claim that the Orders are void because the Court lacks subject matter jurisdiction. They base this claim on two grounds: (1) there is no jurisdiction over the properties owned in part by the limited

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[1] As part of this motion, the Moving Investors also ask the Court to reconsider the investors' plan since they have raised additional funds. The Court denies this request because the Moving Investors have not presented any basis for the Court to relieve them from the Orders under Rule 60. Moreover, not only has the Court already rejected the plan after full consideration, but the Court also finds that the plan still is not a bona fide offer and does not guarantee at least a 10 per centum increase over the price offered in the private sale, as required by 28 U.S.C. § 2001(b).

partnerships because under California law and the partnership agreements, the appointment of the Receiver terminated ACI's status as general partner of the limited partnerships; and (2) the Receiver voluntarily abandoned jurisdiction over the properties located outside of the Central District of California because he did not timely file the required statutory notices. Regardless of the label used by the Moving Investors, these grounds do not involve the subject matter jurisdiction of this Court, they pertain to personal jurisdiction over the ACI Properties and property interests at issue. This action arises from violations of federal securities laws by Defendants. Therefore, the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Unlike subject matter jurisdiction, defects in personal jurisdiction can be waived. *See* Fed. R. Civ. P. 12(h). The Moving Investors have had opportunities to object to the Court's jurisdiction, but they did not raise these jurisdiction arguments prior to the Rule 60 motion,[2] and have not offered any reason why the arguments could not have been raised at an earlier stage. This is the first time that the Moving Investors have objected to the Court's jurisdiction over the ACI Properties on these grounds even though they were given notice of the proceedings in this case, they were permitted to file opposition to the approval and confirmation of the JH Sale, they filed opposition to the sale on other grounds, they appeared at hearings regarding the JH Sale, and they were permitted to be heard at the hearings. Even if the Moving Investors' jurisdiction arguments were not waived by their

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[2] However, the Court notes that a similar argument regarding the authority of the Receiver to enter into the JH Sale under the partnership agreement and California partnership law was made by an investor in objection to the motion to authorize the sale. To the extent that the Moving Investors are making the same argument, it is again rejected by this Court pursuant to *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 210 (1992).

actions, the Court finds that the Court has personal jurisdiction.

1. *Properties held by both ACI and the limited partnerships*

At the October 31, 1994 hearing on the confirmation of the JH Sale a number of investors argued that the Court should not allow the Receiver to sell the ACI Properties because some of the properties belong in part to the limited partnerships, and thus a sale would be a taking of limited partners' property in violation of due process.[3] However, the Court, relying on *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 210 (1992), rejected this argument and found that a court has the power to include the property of a non-party limited partnership in an SEC receivership order, as long as the non-party meets the minimum-contacts standard set out in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and receives actual notice and an opportunity for a hearing. The Court found that under the minimum-contacts analysis of *International Shoe*, this Court's exercise of jurisdiction over these limited partnerships did not violate due process. *See San Vicente*, 962 F.2d 1407. Furthermore, the Court found that the limited partnerships and the individual investors received notice and were given opportunity for a hearing. Therefore, the Court confirmed the sale of the properties not owned solely by ACI.

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[3] Investors who spoke at the October 31 hearing also claimed that a sale of the properties held by the limited partnerships would be a violation of the limited partnership agreements. The Court found that a sale by the general partner would not violate agreements because the agreements gave the limited partner the power to sell partnership assets. Thus, to the extent that the Receiver was exercising ACI's powers under the limited partnership agreements, a sale would not violate the agreements. Furthermore, the Court found that ACI's interest in the limited partnerships was an asset of ACI and therefore, was made part of the receivership order.

The Moving Investors now argue that the Court lacks jurisdiction over the properties owned in part by the limited partnerships because ACI ceased to be the general partner of the partnerships under the partnership agreements and California law when the receivership was imposed. In order to justify an exercise of jurisdiction over property, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in that property. *Shaffer v. Heitner,* 433 U.S. 186, 208 (1977). The standard for determining whether the exercise of jurisdiction over the interests of a person is proper is the minimum-contacts standard of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). *Shaffer,* 433 U.S. at 208. Thus, the analysis of this Court to determine whether the JH Sale violated due process with regard to the limited partners also applies to the exercise of jurisdiction by this Court over the property of the limited partnerships. The limited partners, who have appeared in this Court, were partners in entities that were formed as California limited partnerships and were operated in California. Therefore, the limited partnerships and the limited partners have sufficient minimum contacts for this Court to exercise jurisdiction over them and over the property held by them. This is consistent with the holding of the Ninth Circuit in *In re San Vicente Medical Partners Ltd.,* 962 F.2d 1402, 1408 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 210 (1992), that a court has the power to include the property of a non-party limited partnership in an SEC receivership order. Therefore, the receivership order in this case properly included the ACI Properties which were owned in part by the limited partnerships.[4]

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[4] The properties are within the receivership order regardless of Defendant ACI's status within the partnership after the receivership was instituted. Therefore, the provision of the agreements and of California law terminating ACI as general partner did not limit this Court's power to impose the receivership over the properties controlled by ACI. *See San Vicente,* 962 F.2d 1402,

2. *Jurisdiction pursuant to 28 U.S.C. § 754*

A receiver shall be vested with "complete jurisdiction and control" of property located in a judicial district where he or she files copies of the complaint and the "order of appointment." 28 U.S.C. § 754. Failure to file such copies "within ten days after the order of his appointment" shall divest the receiver of jurisdiction and control. *Id.* The Moving Investors contend that the Receiver was divested of jurisdiction over the ACI Properties located outside this district because he failed to make the required filing within the ten-day period. The Moving Investors argue that the Receiver's order of appointment was the temporary appointment of a receiver pursuant to a temporary restraining order issued by this Court on September 2, 1993. However, this Court finds that the order of appointment in this case within the meaning of 28 U.S.C. § 754 was the preliminary injunction placing Defendant ACI in permanent receivership, which was issued by this Court on September 17, 1993. Therefore, the notices filed by the Receiver in the Southern District of California and Middle District of Florida on September 27, 1993 pursuant to 28 U.S.C. § 754 were timely. Since the filings were timely, the Receiver is vested with complete jurisdiction and control of the ACI Properties.

Mistake of Fact and Law

The Moving Investors argue that the Orders should be set aside because they were based on erroneous information about the true financial condition of the ACI Properties. However, the matters disputed by the Moving Invest-

1409 (9th Cir. 1992) (stating that the receiver "was the receiver for San Vicente's property, not the general partner of San Vicente. Therefore, we hold that section 959(b) [requiring that a receiver shall manage and operate property according to the requirements of state law] does not burden the receiver for limited partnership property with all of the constraints imposed on a general partner . . . .")

ors, which pertain to the cash flow of the ACI Properties, do not affect the fact that the amount offered by the purchaser in the JH Sale is clearly more than two-thirds of the appraised value of the ACI Properties. The facts alleged by the Moving Investors, even if accepted as true for the purposes of this motion, do not amount to a "mistake" under subsection (b)(1) of Rule 60. Thus, the Court's finding in the Orders that the JH Sale is in the best interests of the ACI estate will not be disturbed.

Misrepresentation or Fraud

The Moving Investors argue that the Receiver is guilty of "suppression of the relevant facts and legal doctrines" because he did not inform the Court that the Section 754 filings were untimely, that he could not deliver marketable title to the ACI Properties, and he made the "unsupported assertion of ACI's long-lost status as limited partner." Furthermore, they claim that the Receiver misrepresented the financial condition of the ACI Properties to "create a purposefully false appearance of financial emergency." Under subsection (b)(3) of Rule 60, the movant must (1) prove by clear and convincing evidence that the judgment was obtained through fraud, misrepresentation or other misconduct; and (2) establish that the conduct complained of prevented the moving party from fully and fairly presenting its case or defense. *Jones v. Aero/Chem. Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990) (per curiam). The rule is aimed at judgments which were obtained unfairly, not at those which are factually incorrect. *In re M/V Peacock*, 809 F.2d 1403, 1404 (9th Cir. 1987). The Moving Investors have not shown that the Orders were obtained unfairly because they have not proven by clear and convincing evidence that the Orders were obtained through misconduct. First, as explained above, the Section 754 filings were timely. Second, the marketability of title to the ACI Properties was not material to the Court's approval and confirmation

of the JH Sale.[5] Furthermore, the Receiver's legal arguments regarding ACI's status as general partner of the limited partnerships do not constitute a misrepresentation. Finally, the Moving Investors' claim that the Receiver intentionally misrepresented the financial condition of the ACI Properties is not supported by the evidence in this case. To the extent that there are disagreements between the Receiver and the Moving Investors regarding the precise financial condition of ACI, the Court finds that this is insufficient to prove misconduct by the Receiver.

Newly Discovered Facts

The Moving Investors contend that because of "newly discovered evidence" (i.e., information regarding the financial performance of the properties) the Court should grant relief from the Orders pursuant to subsection (b)(6) of Rule 60. Analyzing this argument under Rule 60 (b)(6),[6] this relief normally will not be granted unless the moving part is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests. *United States v. Alpine Land & Reservior Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 60 (1993). As they stated prior

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[5] The marketability of title is a matter between the parties to the private sale, and is provided for in the contract for the JH Sale.

[6] A motion brought under subsection (b)(6) of Rule 60 must be based on grounds other than those within the other subsections. *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1337 (9th Cir. 1986). Therefore, the Court could treat the Moving Investors' "newly-discovered evidence" argument as falling within subsection (b)(2). To obtain relief under this subsection, the Moving Investors would have to show that the evidence (1) existed at the time the Court entered its judgment, (2) could not have been discovered through due diligence, and (3) was of such magnitude that it would have been likely to change the disposition of the case. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (per curiam). The Moving Defendants have not made such a showing.

to this motion, the Moving Investors oppose the JH Sale and maintaain that it is not in the best interests of the estate because it will give them an insufficient return on their original investment. Although the Moving Investors could arguably show injury because a distribution based on the proceeds of JH Sale will fall far from their original investment, they have not shown that circumstances beyond their control prevented timely action. In fact, the documents submitted by the Moving Investors show that they have had the "newly-discovered" information since at least August 1994. Therefore, the Moving Investors are not entitled to relief under Rule 60(b)(6).

BASED ON THE FOREGOING, the Court finds that the Moving Investors have not shown any reason under Rule 60(b) for the Court to grant relief from the Orders of August 26, 1994 and November 30, 1994, approving and confirming the ACI sale. Therefore, the Rule 60 motion is DENIED.

IT IS SO ORDERED.

Dated: 1/30/95

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
Judge
United States District Court

APPENDIX C

[Filed Nov. 3, 1994]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 93-5280 CBM (JRx)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

AMERICAN CAPITAL INVESTMENTS, INC.,
STEPHEN MURPHY, KENNETH SORENSEN,
RICHARD OTTO, and ADFIN CORP.,
Defendants.

ORDER RE: CONFIRMATION OF SALE

This action was before the Court following an order by this Court on August 26, 1994 approving the sale of real property of Defendant American Capital Investments, Inc. ("ACI"). Pursuant to that order, the Court held a hearing concerning the confirmation of the sale of ACI's properties to J.H. Financial Group ("JH Sale"). At the October 31, 1994 confirmation hearing, various parties appeared before the Court, and were heard. The Court took the matter under submission. Based on the arguments, papers, evidence and record presented to the Court, the Court hereby confirms the JH Sale.

A. *Receivership of ACI*

In September 1993, this Court issued a preliminary injunction placing Defendant ACI in permanent receivership. The order of preliminary injunction appointed a

receiver with "full power over all funds, assets, premises (whether owned, leased, occupied or otherwise controlled), choses in action, books, records, and other property belonging to or in the possession of or control of ACI and the subsidiaries and affiliates."

B. *Sale of ACI Properties*

ACI owns eight parcels of property (collectively, "ACI Properties"), five in California and three in Florida. Two of the eight parcels of property held by ACI generate a profit. Five of the parcels operate at a "substantial" negative cash flow. Further, ACI holds full title to five of the parcels of property and shares title to three parcels with California limited partnerships, of which ACI is the general partner.

JH Financial Group has offered to purchase the ACI Properties for $24.3 million. The terms of the JH Sale are: (1) $200,000 is placed in escrow; (2) ACI places the properties in escrow; (3) title is transferred to JH "as-is and where is"; (4) escrow will close within 60 days from the Court's order confirming the sale. ACI owes approximately $20.5 million on these properties. Thus, the JH Sale would result in payment of approximately $3.8 million to the ACI estate.

The sale to a private party of realty in the possession of a receiver is governed by 28 U.S.C. § 2001(b), which states:

> After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to

> appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

In August 1994, the Court granted the Receiver's motion for an order authorizing a sale of ACI's properties to JH Financial Group. The Court allowed the Receiver to proceed with the JH Sale, subject to certain conditions.[1] When the Court approved the sale it independently selected two sets of appraisers, one set in Florida and one set in California. According to these appraisals, the highest combined value of the ACI properties is $24.3 million, and the lowest value is $17.45 million. Therefore, the JH Sale price is more than two-thirds of the highest appraised value.

C. *Challenge to the JH Sale*

The October 31, 1994, hearing on the confirmation of the JH Sale was attended by the SEC, the Receiver, the Investor Group, and a number of individual investors. The Investor Group, and other investors who spoke argued that the Court should not allow the Receiver to sell the ACI Properties because some of the properties belong in

[1] The JH Sale was approved on two conditions: the completion of independent appraisals of the ACI Properties, and the publishing of notice of the terms of the JH Sale. The Receiver has complied with both of these conditions.

part to the partnerships. However, the Ninth Circuit has clearly rejected this argument, and held that a court has the power to include the property of a non-party limited partnership in an SEC receivership order as long as the party meets the minimum contacts standard set out in *International Shoe v. Washington*, 326 U.S. 310 (1945), and receives actual notice and an opportunity for a hearing. *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 210 (1992). The non-parties at issue here are the limited partnerships of which ACI is the general partner and individual investors are the limited partners. Under the minimum-contacts analysis of *International Shoe*, this Court's exercise of jurisdiction over these entities, formed as California limited partnerships and operating in California, does not violate due process. *See In re San Vicente*, 962 F.2d 1407. Furthermore, the limited partnerships received notice of the receivership proceedings through the general partner, Defendant ACI, and were given opportunity for a hearing. *See id.* The individual investors also received notice of the proceedings. Therefore, this Court may confirm the sale of the properties not owned solely by ACI.

Investors who appeared at the hearing claimed that a sale of the properties held by the limited partnerships would be a violation of the limited partnership agreements. However, as general partner of the limited partnerships, ACI is specifically permitted to sell partnership assets. The partnership agreements provide, in pertinent part:

> 10.2 By way of example, and not by way of limitation or the authority of the General Partner, the General Partner shall have the authority, right, power, and privilege to do or undertake any of the following:
>
> . . .
>
> 10.2.4 Selling, exchanging, or conveying property of the Partnership or any portion thereof.

Thus, the Receiver, exercising ACI's interests and powers under the limited partnership agreements, may sell the properties. Moreover, ACI's interest in the limited partnerships was an asset of ACI and therefore, was made part of the receivership order.

D. *Alternate Plan*

Various investors also challenge confirmation of the sale on the ground that they have a plan which guarantees at least a 10 per centum increase over the price offered in the private sale. Following the October 31, 1994 hearing, a group of investors (not identical to the Investor Group), filed a "Notice of Investor Overbid," making an offer to purchase the ACI Properties at the ten-percent overbid price stated by the Receiver at the hearing ($2.45 million). This notice states that the offer is made "on the same terms and conditions set forth in the agreement between the Receiver and J&H Financial [sic] plus ten percent." [2] The notice of overbid is apparently designed to supplement the plan submitted to the Court at the October 31, 1994 hearing ("Plan").

The Plan proposes to raise the money through letters of credit and investor pledges. The adequacy of these sources of financing for incurring debt or repaying debt is problematic, and the notice of investor overbid does not offer any assurances that the financing is adequate and available. Furthermore, the investors did not deposit any funds in connection with the Plan or the notice of overbid the Receiver proposes that the Court require an overbid deposit ($2.43 million), and that part of the deposit ($1.5 million for creditor claims) be deemed nonrefundable. In reply, John Shelton, an individual investor, argues that an overbid is not necessary because

[2] However, the Receiver states in a declaration submitted to the Court that counsel for the Investor Group informed him that the investors' overbid proposal would not incorporate the purchase of one of the properties owned by ACI; thus the proposal is not in accordance with the terms and conditions of the JH Sale.

the investors already own the ACI properties (since Defendant Murphy no longer "owns" ACI). However, even if the investors own the ACI properties, the 10 per centum increase in price is still required by the statute, and a deposit of funds would protect the estate.

In light of the uncertain financing of the Plan, the Court finds that it does not constitute a bona fide offer which *guarantees* at least a 10 per centum increase over the price offered in the private sale, under Section 2001 (b). *Cf. United States v. Heasley*, 283 F.2d 422 (8th Cir. 1960) (affirming district court's rejection of overbid offer not accompanied by earnest money). In addition, no other "bona fide offers" have been presented to the Court.

E. *Interests of the Estate*

In the hearing, and in their various papers, the investors oppose the JH Sale and maintain that it is not in the best interests of the estate because it will give them an insufficient return on their original investment. They contend that based on their due diligence they can get significantly more return on their investments if they are allowed to regain control of the ACI properties. They propose that they be allowed to "hold on" to the properties for another three to six years, ostensibly so that the values will climb above the current appraised values. However, they offer no adequate business plan as to how they can satisfy ACI's current debt. The best interests of the estate includes not only the interests of the investors, but also the interests of creditors. The JH Sale is in the interests of ACI's creditors because it will provide funds from which they can be repaid.[3] Although

[3] For example, it has been brought to the Court's attention that $197,000 must be available to the estate by December 1, 1994 to cure a default with a lender for one of the ACI properties. As part of this order, the Court instructs the Receiver to immediately notify J.H. Financial Group of the confirmation of the sale so that it can decide whether to provide the Receiver with the funds to cure this default.

a distribution based on the proceeds of JH Sale will fall far from their original investment, the alternative proposed by the various investors poses the risk of total loss to the estate.

BASED ON THE FOREGOING, the Court finds that the JH Sale is in the best interests of the ACI estate. Therefore, the Court hereby confirms the private sale of the ACI Properties to JH Financial Group.

IT IS SO ORDERED.

Dated: 11/30/94

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
Judge
United States District Court

APPENDIX D

[Filed May 2, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-93-5280-CBM (JRx)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

AMERICAN CAPITAL INVESTMENTS, INC.; STEPHEN J. MURPHY; KENNETH A. SORENSEN; RICHARD D. OTTO; and ADFIN CORPORATION,
Defendants.

March 27, 1995

HON. CONSUELO B. MARSHALL

ORDER GRANTING MOTION TO TRANSFER ALL INTERESTS AND CLAIMS OF INVESTORS IN ACI PROPERTIES TO PROCEEDS OF RECEIVERSHIP ESTATE AND TO BAR ANY OTHER ASSERTION OF INTERESTS AND CLAIMS EXCEPT AGAINST THE ESTATE

The Receiver's Motion to Transfer All Interests and Claims of Investors of ACI Properties to Proceeds of Receivership Estate and to Bar Any Other Assertion of Interests and Claims Except Against the Estate was heard by the Court on March 27, 1995. The Court has considered the Motion and the arguments in support of and in opposition to it. Upon consideration, the Court grants the Motion.

Any and all interests and claims of investors in or to the real properties owned by American Capital Investments, Inc. ("ACI"), whether owned solely or with any joint venture or limited partnership or other form of business or person affiliated in any manner with ACI, are hereby ordered transferred to the proceeds of the sale of the properties. "Interests and claims" shall include, without limitation, interests or claims to the properties, whether evidenced by a writing, a deed, or otherwise, of every kind, nature and description based on legal or equitable theories. "Investors" includes every person who claims, or may claim, to be a limited partner in any ACI-affiliated limited partnership, or a joint venturer, shareholder, claimant, lienholder, or other person with an interest in or claim to ACI or ACI's real properties or any affiliate of ACI or any affiliate's real properties.

This Order is without prejudice to the interests and claims of the investors to the extent they are asserted against the proceeds, but only the proceeds, of the sale of the real properties after such proceeds are in the sole possession, custody and control of ACI's Receiver, pursuant to a claim procedure subsequently approved by this Court.

In accordance with *S.E.C. v. Wencke*, 622 F.2d 1363, 1370-1371 and n.11 (9th Cir. 1980) and *S.E.C. v. Wencke*, 577 F.2d 619 (9th Cir.), *cert. denied*, 439 U.S. 964 (1978), all investors and attorneys and other agents and representatives of investors are barred from taking any action, directly or indirectly, to enforce or assert any interests and claims except against the proceeds of the sale of the real properties after such proceeds are in the sole possession, custody and control of ACI's Receiver.

IT IS SO ORDERED.

Dated: 5/2/95

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
United States District Judge

APPENDIX E

[Filed May 3, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-93-5280-CBM (JRx)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

AMERICAN CAPITAL INVESTMENTS, INC.; STEPHEN J. MURPHY; KENNETH A. SORENSEN; RICHARD D. OTTO; and ADFIN CORPORATION,
Defendants.

March 27, 1995

HON. CONSUELO B. MARSHALL

ORDER CONFIRMING RECEIVER'S AUTHORITY TO EXECUTE ADDENDUM TO ACI PROPERTIES SALE AGREEMENT, AND ORDER PROVIDING THAT AGREEMENT'S INDEMNIFICATION PROVISION INCLUDES ADVERSE LEGAL ACTION AGAINST PROPERTIES' BUYER

The Court, having considered the Motion of Receiver for Defendant American Capital Investments, Inc. ("ACI") For Order Confirming Receiver's Authority to Execute Addendum to ACI Properties Sale Agreement, and Order Providing that Agreement's Indemnification Provision Includes Adverse Legal Action Against Properties' Buyer,

all documents filed in support and finding good and sufficient cause therefor,

HEREBY ORDERS that the Motion is granted; the Receiver's authority to execute on behalf of the ACI receivership estate that document entitled "First Amendment to Sale and Purchase Agreement and Joint Escrow Instructions," attached as Exhibit "C" to the Declaration of Richard G. Shaffer filed in support of the Motion, is confirmed; and

FURTHER ORDERS that the indemnification provision, stated in Section 7 of the Sale and Purchase Agreement and Joint Escrow Instructions ("Agreement") setting forth the terms and conditions of the sale of ACI's commercial real estate properties to JH Financial Group, includes any legal claim or action that may be instituted either before or after the sale's closing date by any entity otherwise described as being entitled to indemnification under Section 7.1 of the Agreement, or that affects title to any of the properties, arising from or related to the transaction involved in the Agreement.

IT IS SO ORDERED.

Dated: 5/2/95

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
United States District Judge